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FEDERAL COMMUNICATIONS COMMISSION

*Reed E. Hundt, Chairman
James H. Quello
Andrew C. Barrett
**Ervin S. Duggan

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*Reed E. Hundt designated Charman effective November 29, 1993.
**Ervin S. Duggan resigned January 31, 1994.

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Federal Communications Commission Record

Volume 9
Issue 3

Table of Contents

Table of Cases..... i

Table of FCC and Delegated Authority Numbers..... iii

Table of Docket Numbers..... iv

Table of Rulemakings..... v

Table of Localities..... vi

Table by Subject Matter..... vii

Table by Statutory and Rule Provisions..... ix

Decisions, Reports, Memorandum Opinions, Orders, and Other Selected Material..... 491

Table of Cases
Volume 9
Issue 3

Case Name	Page
AT&T Communications	513
AT&T Communications	512
Allnet Communication Services, Inc.	532
Amendment of Part 2 - Mobile-Satellite Service	536
American Public Communications Council	520
Baton Rogue MSA Limited Partnership	561
Bell Atlantic	553
BellSouth Corporation	602
BellSouth Telecommunications	593
Bott II, Richard	514
Bryan Independent School District	522
Calvary Educational Broadcasting Network, Inc.	575
Central Missouri State University	496
Central Missouri State University	589
Charter Network Company	531
Coast Community College District	586
Coast TV	581
D.D. Cable Partners, L.P.	590
Dann Ocean Towing, Inc.	491
Family Entertainment Network, Inc.	566
Gaines, Bennett Gilbert	533
General Sales Equipment	495
Global Maritime Distress and Safety System	511
Greater Dayton Public Television	500
Greater Dayton Public Television	587
Greater Dayton Public Television	588
Greater Dayton Public Television	592
Hearne Independent School District	525
Henry Broadcasting Company, Inc.	597
Hopkins, Boyd B., Sr.	569
ITT Federal Services Corp.	554
K-Six Television, Inc.	599
MCI Telecommunications Corporation	579
Mariga Communications Corporation	555
Markley, John H.	559
Metro Mobile CTS, Inc.	494
Michigan State University	498
Mobilcom Pittsburg, Inc.	509
Mooreland Public Schools	527
National Broadcasting Company, Inc.	557
National Exchange Carrier Association, Inc.	565
Pacific Bell	492
Pike County Board of Education	529
Pioneer's Preference Rules	605

Case Name	Page
Precision Engineering Industries	560
Pugh, Timothy J.	521
Sioux Valley Rural Television, Inc.	572
Table of Allotments, FM, Athens, OH	507
Table of Allotments, FM, Hermantown, MN	504
Table of Allotments, FM, Minetto, NY	508
Table of Allotments, FM, Ocean Isle Beach, NC	501
Table of Allotments, FM, Quincy, WA	506
Table of Allotments, FM, Taylorville, IL	505
Table of Allotments, FM, Titusville, FL	503
Telecorpus, Inc.	595
Transport Rate Structure and Pricing	615
WavePhore, Inc.	580

Table of Cases by Delegated Authority and FCC Number

Volume 9
Issue 3

Delegated Authority or FCC Number	Page
DA 93 -1535	501
DA 93 -1544	602
DA 93 -1546	503
DA 93 -1547	504
DA 93 -1561	500
DA 93 -1567	589
DA 93 -1571	496
DA 93 -1572	498
DA 93 -1582	505
DA 93 -1583	506
DA 93 -1584	507
DA 93 -1585	508
DA 93 -1600	587
DA 93 -1601	588
DA 93 -1602	586
DA 93 -1604	592
DA 93 -1605	590
DA 94 - 39	495
DA 94 - 41	491
DA 94 - 55	492
DA 94 - 60	513
DA 94 - 61	511
DA 94 - 62	494
DA 94 - 64	520
DA 94 - 65	559
DA 94 - 66	512
DA 94 - 67	580
DA 94 - 68	554
DA 94 - 69	555
DA 94 - 70	557
DA 94 - 73	521
DA 94 - 75	532
DA 94 - 76	531
DA 94 - 77	553
DA 94 - 80	595
DA 94 - 81	597
DA 94 - 83	599
DA 94 - 86	560
DA 94 - 87	561
DA 94 - 88	579
DA 94 - 89	565
DA 94 - 91	593
DA 94 - 92	566
DA 94 - 93	569
DA 94 - 94	572
FCC 93 - 547	536
FCC 93 - 551	605
FCC 94 - 3	522
FCC 94 - 4	525
FCC 94 - 5	527
FCC 94 - 6	529
FCC 94 - 7	509
FCC 94 - 9	615
FCC 94 - 14	533
FCC 94D - 1	514
FCC 94D - 2	581
FCC 94R - 1	575

Table of Cases by Docket Number
Volume 9
Issue 3

Docket Number				Page
CC	Dkt.No.91	-	213	615
ET	Dkt.No.93	-	28	536
ET	Dkt.No.93	-	266	605
MM	Dkt.No.84	-	934	581
MM	Dkt.No.90	-	125	533
MM	Dkt.No.92	-	122	575
MM	Dkt.No.93	-	103	508
MM	Dkt.No.93	-	155	514
MM	Dkt.No.93	-	165	507
MM	Dkt.No.93	-	206	504
MM	Dkt.No.93	-	239	506
MM	Dkt.No.93	-	255	503
MM	Dkt.No.93	-	256	505
MM	Dkt.No.93	-	321	501

Table of Cases by Rulemaking Number
Volume 9
Issue 3

Rulemaking Number	Page
RM - 7771	536
RM - 7773	536
RM - 7805	536
RM - 7806	536
RM - 7927	536
RM - 8206	508
RM - 8247	507
RM - 8284	504
RM - 8313	506
RM - 8322	503
RM - 8326	505
RM - 8409	501

Table of Cases by City
Volume 9
Issue 3

City/ State	Page
Athens, OH	507
Baltimore, MD	533
Blackfoot, ID	514
Bremond, TX	525
Bryan, TX	522
Bryan, TX	525
Colman, SD	572
Corpus Christi, TX	595
Corpus Christi, TX	599
Hermantown, MN	504
Minetto, NY	508
Ocean Isle Beach, NC	501
Omaha, NE	597
Phoenix, AZ	494
Poplar Bluff, MO	575
Quincy, WA	506
Santa Barbara, CA	581
Santa Monica, CA	495
Sedalia, MO	589
Sioux Falls, SD	566
Sioux Falls, SD	569
Society Hill, AL	529
Sun Valley, CA	560
Tampa, FL	491
Taylorville, IL	505
Titusville, FL	503
Warrenton, OR	521
Woodward, OK	527

Subject Index
Volume 9
Issue 3

Subject	Page
Adjudication	
Administrative Law Judge Decision	
Reopening of record	533
Review Board or Commission Decision	
Misrepresentation and lack of candor	514
Reopening of record	514
Broadcasting - FM Stations	
Allotments and assignments	
Allotments, table of	501, 503, 504, 508, 507, 506, 505
Interference	
Blanketing interference, complaints concerning	575
Broadcasting - TV Stations	
Technical considerations	
Transmission standards	580
Cable Television Service	
Markets and services	
Cable signals in major markets, provisions for	496, 498, 589
Commission Organization	
Delegations of authority - Chief, Common Carrier Bureau	
Limitations on delegated authority	513, 553, 579
Common Carriers: Miscellaneous Rules	
Allocation of costs to regulated or non-regulated costs	492
Communications Act of 1934	
Penal provisions; forfeitures	
Rebates and offsets, forfeitures in cases of	521, 559, 560
Radio, provisions for	
Candidates for public office, facilities for	595, 597, 599
Radio, provisions relating to	
License for radio communication or transmission of energy	521, 559
Sanctions, administrative	597
Domestic Public Fixed Radio Services	
Applications and licenses, processing	
Opposition to applications	572
Multipoint distribution service	
Frequency interference	566, 569

Subject	Page
Frequency Allocations and Radio Treaty Matters	
Equipment authorization procedures: application procedures	
Identification of equipment	495
Equipment authorization procedures: conditions on grants	560
Practice and Procedure	
Common carriers: complaints	
Formal or informal	532, 531
Hearing proceedings	
Pleadings, definition of	520
Information, general	
Rules, suspension, amendment, waiver	492
Proceedings, miscellaneous	
Forfeiture proceedings	495, 521, 559, 560
Violations, notice of	491
Reconsideration/review of Commission action	
Reconsideration of a final FCC action, petiti	495, 494, 521, 559, 566, 569
Private Land Mobile Radio Services	
Licensing/use of frequencies in 806-821, 851-866 MHz bands	
Loading requirements for trunked systems	509
Public Mobile Service	
Applications and licenses-filing requirements	
Amendment of applications	494
Requirements	494
Applications and licenses-processing	
Consideration of applications	494
Station authorization, transfer of control/assignment of	561
Transfer/assignment of applications, considerations involving	494
Domestic public cellular radio telecommunications service	
Applications, amendment of	494
Applications, considerations involving transfer/assignment of	494
Financial qualifications	494
Special Broadcast Services	
Instructional TV fixed service	
Applications, selective procedures for mutual	522, 525, 527, 529
Licensing requirements and eligibility factor	522, 525, 527, 529

TABLE OF STATUTORY AND RULE PROVISIONS

	Page
000.291 delegated authority	512
000.291 Delegated Authority	553
000.291 Delegated authority	579
000.291 Delegated Authority	593
000.310	561
000.503 (b)	561
001.060 Petition for Reconsideration	521
001.106 Petition for Reconsideration	495
001.106 Petition for Reconsideration	559
001.106 Petition for Reconsideration	569
001.106 Petition for Reconsideration.	566
001.106 Petitions for Reconsideration	494
001.200 Declaratory rulings	520
001.300, Suspension, Amendment or Waiver of rules	492
001.711 Formal or informal complaints	531
001.711 Formal or informal complaints	532
001.800 Authorization of Forfeiture Procedings	560
001.800 Authorization of forfeiture proceedings	559
001.800 Forfeiture Proceedings	495
001.800 Forfeiture Proceedings	521
001.890 Notice of Violations	491
002.925 Identification of Equipment	495
002.946 Penalty for failure to provide test samples and data	560
013.207 Preparing an examination	511
021.300 Opposition to applications.	572
021.902 Frequency Interference	569
021.902 Frequency Interference)	566
022.130 Application Requirements	494
022.230 Amendment of Applications	494
022.320 Consideration of Applications	494
022.390	561
022.400 Considerations involving transfer applications	494
022.917 Demonstration of Financial Qualfications	494
022.918 Amendment of Cellular Applications	494
022.920 Considerations involving transfer applications for c	494
063.001 Contents of Application	554
063.001 Contents of Application	555
064.704 Call blocking prohibited	520
064.901 Allocation of Costs	492
069.606	565
073.1942 Candidate Rates	595
073.1942 Candidate Rates	597
073.1942 Candidate Rates	599
073.1943 Political File	595
073.202 FM Table of Allotments	503
073.202 FM Table of Allotments	504
073.202 FM Table of Allotments	505
073.202 FM Table of Allotments	506
073.202 FM Table of Allotments	507
073.202 FM Table of Allotments	508

073.318 Blanketing Interference 575
073.682 TV TRANSMISSION STANDARDS 580
074.913 SELECTION PROCED FOR MUTUALLY EXCLUSIVE ITFS APPLICA 529
074.913 SELECTION PROCED. FOR MUTUALLY EXCLUSIVE ITFS APPLIC 527
074.913 SELECTION PROCEDURE FOR MUTUALLY EXCLUSIVE ITFS APPL 522
074.913 SELECTION PROCEDURE FOR MUTUALLY EXCLUSIVE ITFS APPL 525
074.932 ELIGIBILITY AND LICENSING REQUIREMENTS 522
074.932 ELIGIBILITY AND LICENSING REQUIREMENTS 525
074.932 ELIGIBILITY AND LICENSING REQUIREMENTS 527
074.932 ELIGIBILITY AND LICENSING REQUIREMENTS 529
076.502 Three-year holding requirement 590
076.610(b) Complaints regarding qualified NCE stations 496
076.610(b) Complaints regarding qualified NCE stations 498
076.610(b) Complaints regarding qualified NCE stations 500
076.610(b) Complaints regarding qualified NCE stations 586
076.610(b) Complaints regarding qualified NCE stations 587
076.610(b) Complaints regarding qualified NCE stations 588
076.610(b) Complaints regarding qualified NCE stations 589
076.610(b) Complaints regarding qualified NCE stations 592
090.631(b) Trunked systems loading, construction and authori 509
300.214 Extension of Lines 555
300.214 Extenstion of Lines 554
300.301 License for Radio Communication or Transmission of E 521
300.301 License for Radio Communication or transmission of E 559
300.302 Devices which Interfere with Radio Reception 495
300.309 Action Upon Applications 557
300.312 Administrative Sanctions 597
300.312 Administrative Sanctions 599
300.315 Facilities for candidates for public office 595
300.315 Facilities for Candidates for Public Office 597
300.315 Facilities for Candidates for Public Office 599
300.503 Forfeiture in cases of rebates and offsets 560
300.503 Forfeitures in cases of Rebates and Offsets 521
300.503 Forfeitures in cases of Rebates and Offsets 559
300.535 Carriage of noncommercial educational television 496
300.535 Carriage of noncommercial educational television 498
300.535 Carriage of noncommercial educational television 500
300.535 Carriage of noncommercial educational television 587
300.535 Carriage of noncommercial educational television 588
300.535 Carriage of noncommercial educational television 589
300.535 carriage of noncommercial educational television 592
300.535 Carriage of noncommercial television 586
300.537 Sales of cable systems 590
47 C.F.R. Section 0.291 delegated authority 513
47 USC 309 Action on Applications 494
47 USC 405 Reconsiderations 494
500.2125 misrepresentation and lack of candor 514
500.3125 Misrepresentation and Lack of Candor 533
500.3200 Reopening of Record 533
License for Radio Communication 491

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Dann Ocean Towing, Inc.
Tampa, Florida

NAL/Acct. No: 215PS0008

ORDER

Adopted: January 6, 1994; Released: January 25, 1994

1. Dann Ocean Towing, Inc., (Dann) has requested review of a forfeiture action. The Forfeiture Order was released August 27, 1992. The forfeiture is mitigated to $600.

2. Dann was charged with operation of a maritime mobile radio station on an unauthorized frequency in willful violation of 47 U.S.C. §301 and repeated failure to respond to the ensuing Notice of Violation, 47 C.F.R. §1.89.

3. Dann makes no arguments. It presents nothing which was not before the Engineer-in-Charge. The Commission has, however, reconsidered the usual forfeiture for the violations. Pursuant to the *1993 Policy Statement, Standards for Assessment of Forfeitures*, 8 FCC Rcd 6215 (1993) the base forfeiture amount for using an unauthorized frequency by a marine station is $4,000 and for failure to respond to Commission correspondence is $4,000. Considering that Dann has no history of noncompliance and its apparent confusion about the frequencies authorized for its use, it is consistent with the *Policy Statement* that the forfeiture amount be reduced to $200 for use of the unauthorized frequency and that the forfeiture amount be reduced to $400 for failure to reply.

4. Accordingly, IT IS ORDERED, pursuant to Section 1.80 of the Commission's rules, that Dann Ocean Towing, Inc. pay a forfeiture of $600 within 30 days of the release of this Order.

5. Forfeiture payments shall be made by check or money order payable to the Federal Communications Commission, NAL/Acct. No.: 215PS0008, and mailed to the following address:

Federal Communications Commission
P.O. Box 73482
Chicago, IL 60673-7482

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Pacific Bell AAD 93-157

Reallocation of Nonregulated Investment

MEMORANDUM OPINION AND ORDER

Adopted: January 13, 1994; Released: January 25, 1994

By the Acting Chief, Common Carrier Bureau:

I. INTRODUCTION AND BACKGROUND

1. On January 21, 1993, Pacific Bell (Pacific) filed a petition for waiver of Section 64.901(b)(4) of the Commission's rules[1] (petition), requesting approval to reallocate certain equipment from nonregulated cost pools to regulated cost pools. This equipment, which was originally purchased solely to support Pacific's nonregulated operations, has been used since 1990 to support both regulated and nonregulated operations. As discussed in the succeeding paragraphs, we approve Pacific's request to reallocate this equipment effective January 1, 1993.

2. In the *Joint Cost Orders*,[2] the Commission specified that absent a waiver, investment assigned to nonregulated use may not be reassigned to regulated use. This policy was intended to insure that investment risk incurred in nonregulated ventures is not shifted to the regulated side of the carrier's business. We will waive these rules if a carrier submits a convincing showing that (1) its regulated activities require the use of plant capacity allocated to nonregulated activities, and (2) it cannot obtain the needed capacity elsewhere at a lower cost. If a waiver is granted, the investment must be transferred at an amount no greater than the depreciated cost or its fair market value.[3]

II. SUMMARY OF PETITION

3. In its petition, Pacific requests permission to reallocate certain computer equipment consisting of Tandem VLX equipment (VLX), which is currently assigned to Account 2212 (Digital electronic switching), and ARIX 850 Platform Hardware equipment (ARIX), which is currently assigned to Account 2124 (General purpose computers), from nonregulated cost pools to common cost pools.[4]

A. VLX Equipment

4. Pacific states that the VLX equipment was originally purchased to support its nonregulated operations. In 1990, due to an increased need for mechanized service order processing capacity, Pacific began to use this equipment to support its joint service order processing activities.[5] In its petition, Pacific provides documentation showing the depreciated cost and the fair market value of the VLX equipment as of 1990.[6] In a subsequent *ex parte* filing, Pacific provided additional documentation showing the depreciated cost and the fair market value of the VLX equipment as of 1993.[7]

B. ARIX Equipment

5. Pacific states that it originally purchased the ARIX equipment to provide nonregulated service (i.e., voice mail), but never used it for that purpose. Pacific states that it installed this equipment in a San Francisco installation center in 1990 to satisfy an immediate need for service order processing and dispatch capacity. This equipment supports both regulated and nonregulated operations. In its petition, Pacific provides documentation showing the depreciated cost and the fair market value of the ARIX equipment as of 1990.[8] In a subsequent *ex parte* filing, Pacific provided additional documentation showing the depreciated cost and the fair market value of the ARIX equipment as of 1993.[9]

III. DISCUSSION

6. We believe that Pacific has met the criteria necessary to allow reallocation of this investment from nonregulated to common cost pools. Pacific demonstrates that the reallocation of these investments meets the Commission's standards for approval, since the equipment is necessary to support Pacific's regulated activities, and comparable capacity cannot be obtained at a cost lower than the equipment's current (1993) fair market value. These investments should be reallocated at their current fair market value rather than depreciated cost, because that value is the best indication of what Pacific would pay to obtain comparable computer equipment in today's market. We do not agree with Pacific, however, that the reallocation should be retroactive to 1990, when Pacific began to use the equipment to support joint activities. The Commission's intent in the *Joint Cost Orders* was to allow carriers who meet the criteria for reallocation of nonregulated investment to do so on a timely basis. We will not approve reallocation

---

[1] 47 C.F.R. §64.901(b)(4).

[2] *Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities, Report and Order*, CC Docket No. 86-111, 2 FCC Rcd 1298 (1987) (*Joint Cost Order*), *recon.*, 2 FCC Rcd 6283 (1987) (*Recon. Order*), *further recon.*, 3 FCC Rcd 6701 (1988) (*Further Recon. Order*), *aff'd sub nom.* Southwestern Bell Corp. v. FCC, 896 F.2d 1378 (D.C. Cir. 1990).

[3] *Further Recon . Order*, 3 FCC Rcd at 6705, para. 29; *Recon. Order*, 2 FCC Rcd at 6291, para. 66; *Joint Cost Order*, 2 FCC Rcd at 1320, para. 169 & 1353, n.284.

[4] Pacific Petition at 3-4.

[5] *Id.* at 4-5.

[6] As of 1990, Pacific estimates that the depreciated cost of the VLX equipment was $609,947, and the fair market value was $284,200.

[7] As of 1993, Pacific estimates the depreciated cost of the VLX equipment to be $483,000 and the fair market value to be $75,920. Pacific *Ex Parte* filing, Calculation Table.

[8] As of 1990, Pacific estimates that the depreciated cost of the ARIX equipment was $124,916, and the fair market value was $152,751.

[9] As of 1993, Pacific estimates the depreciated cost of the ARIX equipment to be $60,272 and the fair market value to be $10,000. Pacific *Ex Parte* filing, Calculation Table.

retroactive to 1990, in this instance, because Pacific did not file a timely request for reallocation and because it provides no justification for retroactive application of the reclassification. Therefore, we authorize Pacific to reallocate a portion of its VLX and ARIX investment to common cost pools as of January 1, 1993; however, the reallocated amount shall not exceed the 1993 fair market value, i.e., $75,920 for the VLX equipment and $10,000 for the ARIX equipment.

7. Finally, Pacific states that it intends to reclassify its VLX investment from Account 2212, Digital electronic switching, to Account 2124, General purpose computers. We agree that this reclassification is consistent with our accounting rules. We therefore direct Pacific to make this reclassification.

IV. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), 201-205, 215, and 218-220 of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i), 154(j), 201-205, 215, and 218-220 that Pacific Bell's petition for waiver of Section 64.901(b)(4) of the Commission's rules to reallocate its investment in computer equipment IS GRANTED to the extent and subject to the conditions specified herein.

9. IT IS FURTHER ORDERED, pursuant to Sections 4(i), 4(j), 201-205, 215, and 218-220 of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i), 154(j), 201-205, 215, and 218-220 that Pacific Bell SHALL RECLASSIFY the VLX equipment as stated in paragraph 7 of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Acting Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

METRO MOBILE CTS, INC.
File Nos. 02886-CL-TC-1-92
02888-CL-TC-1-92
02893-CL-TC-1-92
02521-CL-MP-89
04376-CL-MP-92

For Consent to Transfer Control of Authorizations in the Domestic Public Cellular Radio Telecommunications Service to Bell Atlantic Enterprises International, Inc.

MC ELROY ELECTRONICS, INC.
File No. 02639-CL-MP-89

For Authorization to Serve Unserved Areas in Metropolitan Statistical Area Market No. 26A Phoenix, Arizona

JAJ CELLULAR
File No. 02905-CL-MP-89

For Authorization to Serve Unserved Areas in Metropolitan Statistical Area Market No. 26A Phoenix, Arizona

ERRATUM

Released: January 25, 1994

By the Chief, Mobile Services Division:

1. The *Memorandum Opinion and Order on Reconsideration* in the above-captioned proceeding, FCC 93-530 (released Dec. 13, 1993), is corrected to change the file number in the caption for JAJ CELLULAR from "File No.5 802905-CL-MP-89" to "File No. 02905-CL-MP-89."

FEDERAL COMMUNICATIONS COMMISSION

John Cimko
Chief, Mobile Services Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

General Sales Equipment NAL Acct. No. 215LA0012
Santa Monica, Calif.

Liability for Monetary Forfeiture

ORDER

Adopted: January 7, 1994; Released: January 26, 1994

By the Field Operations Bureau:

I. INTRODUCTION

1. The Bureau has before it a Petition for Reconsideration filed by General Sales Equipment (Petitioner) pursuant to Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, requesting reconsideration of the Bureau's July 31, 1992, action finding Petitioner liable for a monetary forfeiture in the amount of $700 for violating Section 302 of the Communications Act of 1934 as amended, 47 U.S.C. § 302 (the Act), and Section 2.925 of the Rules, 47 C.F.R. § 2.925. As explained below, we are cancelling the monetary forfeiture penalty.

II. BACKGROUND

2. On October 23, 1991, an FCC inspector visited the Fall 1991 COMDEX trade show in Las Vegas, Nevada, where Petitioner was exhibiting the "SuperCom, Model JAX-8212 VGA Card", a personal computer peripheral. The inspector noted that the device had no nameplate or label, and in fact, appeared to be uncertified because it had no FCC ID number affixed to the case as required under Section 15.101 of the Commission's Rules.

3. On June 8, 1992, the FCC's Los Angeles Office (LA Office) issued a Notice of Apparent Liability (NAL) to General Sales Equipment for violating Section 302(b) of the Act and Section 2.803 of the FCC's Rules by marketing computers that had not been authorized by the FCC prior to marketing. 47 C.F.R. § 2.803. By letter dated June 23, 1992, Petitioner responded to the NAL, and submited proof that FCC authorization for the VGA Card had been granted to Trident Microsystems, Inc., of Mountain View, California, under FCC ID: HNG8916CX24BLC2 on June 27, 1991. Upon review of the response, the LA Office issued a Notice of Forfeiture to Petitioner for $700 on July 31, 1992. The Forfeiture Order cited Petitioner for violating labelling requirements under Section 2.925 of the Rules. Petitioner now seeks reconsideration.

III. DISCUSSION AND CONCLUSION

4. Section 1.80(f) of the Commission's Rules, 47 C.F.R. § 1.80(f), governing the content of notices of violation, requires the Commission to identify specific Act or Rule provisions which were violated by the subject in the NAL. We note that the NAL did not cite the party for violating the labelling requirements. Since only a violation of Section 2.803 (lack of certification) was cited in the notice, Petitioner has not had opportunity to address the labelling issue.

5. For the reasons stated above, we are cancelling the Forfeiture Order issued to General Sales Equipment on July 31, 1992.

V. ORDERING CLAUSES

6. IT IS ORDERED that pursuant to Section 503(b) of the Communications Act of 1934 and Section 1.106 of the FCC's rules, that the relief sought in Petitioner's request for higher level review is GRANTED.

7. IT IS FURTHER ORDERED that a copy of this Order shall be sent certified mail, return receipt requested, to General Sales Equipment.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Central Missouri	CSR-3951-M
State University against	MO0911
Friendship Cable of Missouri	

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: December 13, 1993; Released: January 25, 1994

By the Chief, Mass Media Bureau

1. On July 8, 1993, a petition on behalf of Central Missouri State University, licensee of Station KMOS-TV (Educ., Ch. 6), Sedalia, Missouri, was filed with the Commission claiming that Friendship Cable of Missouri ("Friendship"), operator of a cable television system serving Greenview, Missouri, had declined to carry the station, even though the Grade B contour of KMOS-TV encompasses the system's principal headend at Greenview[1] and is therefore a "local" signal within the meaning of Section 5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992). KMOS-TV requests that the Commission not only order Friendship to carry its signal on the cable system, but also order that the system carry it on Channel 6, the channel on which it broadcasts over-the-air.

2. On August 5, 1993, Friendship filed an opposition to this complaint, in which it acknowledges that KMOS-TV meets the 1992 Cable Act's tests as a qualified NCE station, because the system is on the edge of KMOS-TV's Grade B contour and located within 50 miles of Sedalia. However, Friendship contends that KMOS-TV failed to deliver a good quality signal to its headend. It argues, therefore, that it is not required to carry KMOS-TV's signal, pursuant to Section 615(g)(4) of the 1992 Cable Act. In support of its contention, Friendship submits a statement by its field service engineer, Bob Green, that indicates that KMOS-TV delivers an off-air signal to Friendship's headend processing equipment at Greenview that is -4dBm. Accordingly, Friendship asserts that KMOS-TV does not qualify for carriage on its system serving Greenview, and that its request for carriage should be dismissed.

3. On September 7, 1993, KMOS-TV filed a response to Friendship's opposition to its complaint. In its response, KMOS-TV states that as of September 1, 1993, it has failed to receive a response from Friendship regarding its request of June 3, 1993, to be furnished with information regarding its geographical coordinates and the off-air broadcast stations carried upon its system serving Greenview. In the absence of this information, KMOS-TV states that it has attempted to analyze the data submitted by Friendship and feels that the field survey analysis survey it submitted is, at best, incomplete. Further, KMOS-TV argues that Friendship has not shown that it conducted the field analysis tests in accordance with the practices that the cable system uses to receive and process other off-air stations which are currently being carried. KMOS-TV states that it is probable that different engineering practices were used to test and process the reception level of its signal, noting that the antenna was put on a forty-foot tower and that the field survey was not dated and did not indicate the orientation of the reception antenna for KMOS-TV's signal, and that there were no periodic measurements of the signal.

4. Friendship's objection concerning KMOS-TV's signal strength does not follow generally acceptable engineering practices to determine what constitutes a good quality signal. Although the 1992 Cable Act failed to set a standard for noncommercial educational ("NCE") stations, it did adopt a standard for determining the availability of VHF and UHF commercial stations at a cable system's headend. To establish the availability of a VHF commercial station's signal, the 1992 Cable Act set out a standard of -49 dBm at a cable system's headend. A standard of -45 dBm was established for UHF commercial stations signals. Since these standards address the issue of availability of a station's signal, consistent with Congress' guidance with respect to VHF and UHF commercial station availability, we see no reason not to utilize the same standards as *prima facie* tests to initially determine whether a NCE station provides a cable system with a good quality signal. Generally, if the test results for VHF stations are less than -55 dBm, we believe that at least four readings must be taken over a two hour period. Where the initial readings are between -55 dBm and -49 dBm, inclusive, we believe that the readings should be taken over a 24-hour period, with measurements no more than four hours apart to establish reliable test results.[2] In addition to the information required by our rules to be furnished to the affected station when there is a dispute over signal level measurements,[3] cable operators are expected to employ sound engineering measurement practices. Therefore, signal strength surveys should, at a minimum, include the following: 1) specific make and model numbers of the equipment used, as well as its age and most recent date(s) of calibration; 2) description(s) of the characteristics of the equipment used such as antenna ranges and radiation patterns; 3) height of the antenna above ground level and whether the antenna was properly oriented; and 4) weather conditions and time of day when the tests were done. When measured against these criteria, we conclude that the information submitted by Friendship is insufficient to demonstrate that KMOS-TV does not provide a good quality signal to the cable systems' principal headend.

5. Accordingly, the complaint filed July 1, 1993, by Central Missouri State University IS GRANTED in accordance with §615(j)(3)(47 U.S.C. §535) of the Communica-

[1] We note that Friendship has not provided its headend coordinates to KMOS-TV as required by Section 76.58(b) of the Rules, despite KMOS-TV's letter of December 23, 1992 requesting carriage. As such, we accept petitioner's conclusion that Friendship's headend for this system is located at Greenview, Missouri.

[2] Generally, if the test results for UHF stations are less than -51 dBm we believe that at least four readings must be taken over a two hour period. Where the initial readings are between -51 dBm and -49 dBm, inclusive, we believe that the readings should be taken over a 24 hour period with measurements not more than four hours apart to establish reliable test results.

[3] *See* §76.61 of the Commission's Rules.

tions Act of 1934, as amended, and Friendship Cable of Missouri IS ORDERED to commence carriage of Station KMOS-TV, Sedalia, Missouri, on channel 6 on its cable television system serving Greenview, Missouri, forty-five (45) days from the release date of this *Order* unless Friendship submits the engineering data required herein to support its assertion of poor signal quality at its principal headend. This action is taken by the Chief, Mass Media Bureau, pursuant to authority delegated by §0.283 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Michigan State University against Crystal Cable TV, Inc. — CSR-4011-M

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: December 15, 1993; Released: January 25, 1994

By the Chief, Mass Media Bureau:

1. On August 5, 1993, Michigan State University ("MSU"), licensee of WKAR-TV, East Lansing, Michigan, filed a complaint against Crystal Cable TV, Inc. ("Crystal Cable"), pursuant to Section 615 of the Communications Act, 47 U.S.C. § 535. MSU requests that the Commission order Crystal Cable to carry WKAR-TV on Crystal Cable's cable system serving Crystal, Michigan. No oppositions were filed.

2. Section 615 of the Communications Act of 1934, as amended, requires a cable system to carry the signals of qualified local noncommercial educational television stations. *See* 47 U.S.C. § 535. A television station that is licensed by the Commission as a noncommercial educational television station and is owned and operated by a public agency, nonprofit foundation, corporation or association that is eligible to receive a community service grant from the Corporation for Public Broadcasting will be considered a qualified noncommercial educational television station. *See* 47 U.S.C. § 535(l)(1)(A); 47 C.F.R. § 76.55(a)(1). A qualified noncommercial educational television station that is licensed to a community whose reference point is within 50 miles of the principal headend, or, whose Grade B service contour encompasses the principal headend of the cable system will be considered local. *See* 47 U.S.C. §§ 535(l)(2)(A)(B); 47 C.F.R. § 76.55(b)(1)(2).

3. MSU contends that WKAR-TV is a qualified local noncommercial educational television station and therefore it has the right to carriage on Crystal Cable's Crystal, Michigan, cable system. We agree. MSU has presented the following evidence with respect to WKAR-TV: WKAR-TV is licensed as a noncommercial educational television station; it is owned and operated by Michigan State University, a public agency operating under the laws of the state of Michigan; it is eligible to receive a community service grant from the Corporation for Public Broadcasting; and, East Lansing's reference point is within 50 miles of the principal headend. MSU states that, although it does not know the exact location of the principal headend, based on the distance from East Lansing, it believes that the station's Grade B contour encompasses the principal headend of Crystal Cable's system. Accordingly, WKAR-TV meets the Commission's definition of a qualified local noncommercial educational television station.[1]

4. MSU asserts that it did not receive from Crystal Cable the required June 2, 1993, notice of stations carried on its system, *see* 47 C.F.R. § 76.58(e), and that, in a July 7, 1993 letter, MSU requested a list of stations carried on Crystal Cable. On July 13, 1993, Crystal Cable informed MSU that WKAR was not carried on its cable system.[2] In a July 19,

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[1] MSU also notes that WKAR-TV was carried on the Crystal Cable system on March 29, 1990.

[2] In its letter, Crystal Cable stated that WKAR-TV was discontinued and replaced with WLIX-TV because "the community of interest is closer to Mt. Pleasant[sic] and also the redundancy of programming with WCMU. Therefore, our customers chose to retain WCMU and replace WKAR." Further, noted Crystal Cable, the signal level of WKAR-TV was -65 dBm. It appears, however, that Crystal Cable failed to substantiate this allegation using generally acceptable engineering practices.

With respect to the standard to be used to determine what constitutes a "good quality" signal, the 1992 Cable Act failed to set a standard for either VHF or UHF noncommercial stations. However, the 1992 Cable Act did adopt a standard for determining the availability of VHF and UHF commercial stations at a cable system's headend. To establish the availability of a VHF commercial station's signal, the 1992 Cable Act set out a standard of -49 dBm at a cable system's headend. A standard of -45 dBm was established for UHF commercial station signals. Consistent with Congress' guidance with respect to VHF and UHF commercial station availability, we will utilize the same standards as *prima facie* tests to initially determine, absent other evidence, whether VHF or UHF noncommercial stations place adequate signal levels over a cable system's principal headend. *See, e.g., Memorandum Opinion and Order* (CSR-3799-M)(Complaint of Channel 5 Public Broadcasting, Inc. against WestStar Cable), DA-93-896 (released July 23, 1993).

To determine whether a certain level of signal is present, it is necessary to submit a series of measurements, not just one. Generally, if the test results are less than -55 dBm for a VHF station, at least four readings must be taken over a two-hour period. Where the initial readings are between -55 dBm and -49 dBm, inclusive, the readings should be taken over a 24-hour period, with measurements no more than 4 hours apart to establish reliable test results. In addition to the information required by our rules to be furnished to the affected station when there is a dispute over signal level measurements, *see* 47 C.F.R. § 76.61, cable operators are expected to employ sound engineering measurement practices. Signal strength surveys, therefore, should include, at a minimum, the following: 1) specific make and model numbers of the equipment used, as well as its age and most recent date(s) of calibration; 2) description(s) of the characteristics of the equipment used, such as antenna ranges and radiation patterns; 3) height of the antenna above ground level and whether the antenna was properly oriented; and 4) weather conditions and time of day when the tests where done.

1993 letter, MSU requested that Crystal Cable carry WKAR-TV.[3] This request was denied by Crystal Cable in a July 21, 1993 letter.[4]

5. In view of the above, the complaint filed on July 8, 1993 by Michigan State University, licensee of WKAR-TV, East Lansing, Michigan (CSR-4011-M) IS GRANTED, in accordance with Section 615(j)(3) of the Communications Act of 1934, as amended, 47 U.S.C. § 535. Furthermore, Crystal Cable TV, Inc. IS ORDERED to commence carriage of WKAR-TV within forty-five (45) days from the release date of this *Order* on its system serving Crystal, Michigan. This action is taken by the Chief, Mass Media Bureau, pursuant to authority delegated by Section 0.283 of the Commission's rules, 47 C.F.R. § 0.283.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

We note that, regardless of the matters raised by Crystal Cable in its letters, neither Crystal Cable, nor any other party, filed an opposition to MSU's complaint.

[3] In its letter, MSU noted that cable systems with 13 to 36 channels must carry all qualified, local noncommercial stations up to a total of three, *see* 47 U.S.C. § 535(b)(3). MSU also noted that although Crystal Cable believed WKAR-TV's signal was inadequate, the station was previously on its system, no changes have been made to the station's transmission system, and that Crystal Cable is obligated to measure the station's signal with a test antenna at the same height as that used for similar signals which are carried.

[4] In its letter, Crystal Cable stated that if WKAR-TV could provide a signal of at least -45 dBm, at MSU's cost, Crystal would carry the station.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Greater Dayton Public Television against TCI Cablevision of Indiana, Inc. CSR-3938-M

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: December 8, 1993; Released: January 25, 1994

By the Chief, Mass Media Bureau:

1. On July 19, 1993, Greater Dayton Public Television ("Greater Dayton"), licensee of WPTO-TV, Oxford, Ohio, filed a complaint against TCI Cablevision of Indiana, Inc. ("TCI"), pursuant to Section 615 of the Communications Act, 47 U.S.C. § 535. Greater Dayton requests that the Commission order TCI to carry WPTO-TV on TCI's cable system serving Dublin, Indiana, and that WPTO-TV be carried on Channel 14.

2. Pursuant to Section 615(b) of the Communications Act of 1934, as amended, with respect to a cable system with more than 36 channels, a cable operator must carry on its cable system any qualified local noncommercial educational television station requesting carriage. 47 U.S.C. § 535(b)(1).[1] A television station that is licensed by the Commission as a noncommercial educational television station and is owned and operated by a public agency, nonprofit foundation, corporation or association that is eligible to receive a community service grant from the Corporation for Public Broadcasting will be considered a qualified noncommercial educational television station. *See* 47 U.S.C. § 535(l)(1)(A); 47 C.F.R. § 76.55(a)(1). A qualified noncommercial educational television station which is licensed to a principal community whose reference point, as defined in 47 C.F.R. § 76.53, is within 50 miles of the principal headend of the cable system will be considered local. *See* 47 U.S.C. § 535(l)(2)(A); 47 C.F.R. § 76.55(b)(1). Notwithstanding the above, however, a cable operator shall not be required to carry the signal of any qualified local noncommercial educational television system which does not deliver to the cable system's principal headend a signal of good quality or baseband video signal. *See* 47 U.S.C. § 535(g)(4).

3. Greater Dayton contends that WPTO-TV is a qualified local noncommercial educational television station and therefore it has the right to carriage on TCI's Dublin, Indiana, 37-channel cable system. We agree. Greater Dayton has presented the following evidence with respect to WPTO-TV: WPTO-TV is licensed as a noncommercial television station; it is owned by Greater Dayton, a nonprofit corporation; it is eligible to receive a community service grant from the Corporation for Public Broadcasting, and; it is licensed to Oxford, Ohio, whose reference point, according to Section 76.53, is within 50 miles of the principal headend of TCI's Dublin, Indiana cable system. Accordingly, WPTO-TV meets the Commission's definition of a qualified local noncommercial educational television station. In addition, Greater Dayton notes, in its correspondence with Greater Dayton, TCI has not indicated any signal quality deficiencies or copyright concerns with respect to carriage of WPTO-TV. Greater Dayton has submitted two letters, dated May 19, 1993, and June 17, 1993, which it sent to TCI requesting carriage on Channel 14. Greater Dayton also submitted a June 1, 1993 letter from TCI containing TCI's channel lineup for its cable system, which lineup does not include WPTO-TV.

4. According to Section 615(g)(5), a qualified local noncommercial educational station carried pursuant to must-carry requirements must appear on the cable system channel number on which it is broadcast over-the-air, or on the channel on which it was carried on July 19, 1985, at the election of the station, or on such other channel as is mutually agreed upon by the station and the cable operator. 47 U.S.C. § 535(g)(5); 47 C.F.R. § 76.57(b). Because Greater Dayton has elected that WPTO-TV be carried on its over-the-air channel, Channel 14, we will grant its request that the Commission order TCI to carry WPTO-TV on Channel 14.

5. In view of the above, the complaint filed on July 19, 1993 by Greater Dayton Public Television, licensee of WPTO-TV, Oxford, Ohio (CSR-3938-M) IS GRANTED, in accordance with Section 615(j)(3) of the Communications Act of 1934, as amended, (47 U.S.C. § 535). Furthermore, TCI Cablevision of Indiana, Inc. IS ORDERED to commence carriage of WPTO-TV on Channel 14 within forty-five (45) days from the release date of this *Order* on its system serving Dublin, Indiana. This action is taken by the Chief, Mass Media Bureau, pursuant to authority delegated by § 0.283 of the Commission's rules, 47 C.F.R. § 0.283.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

[1] A cable system with more than 36 channels is required to carry a minimum of three qualified local noncommercial educational television stations. A cable system is not required, however, to carry the signals of additional educational stations if they substantially duplicate the programming broadcast by another qualified local noncommercial educational television station already being carried. *See* 47 U.S.C. § 535(e). *See* 47 C.F.R. § 76.56(a)(1) for the definition of substantial duplication.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-321

In the Matter of

Amendment of Section 73.202(b), RM-8409
Table of Allotments,
FM Broadcast Stations.
(Ocean Isle Beach, North Carolina)

NOTICE OF PROPOSED RULE MAKING

Adopted: December 21, 1993; Released: January 25, 1994

Comment Date: March 17, 1994
Reply Comment Date: April 1, 1994

By the Acting Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Ocean Isle Broadcasting Company ("petitioner") requesting the allotment of Channel 228A to Ocean Isle Beach, North Carolina, as its first aural transmission service. Petitioner states that it will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 228A to Ocean Isle Beach, North Carolina, since it could provide the community with its first local aural transmission service.

Engineering Summary

3. Channel 228A can be allotted to Ocean Isle Beach in compliance with the Commission's minimum distance separation requirements with a site restriction of 4.3 kilometers (2.7 miles) west to avoid a short-spacing to vacant but applied-for Channel 229A at Wrightsville Beach, North Carolina.[1] We recognize that the allotment at Ocean Isle Beach is short-spaced to the present operation of Station WDZD, Channel 228A, Shallotte, North Carolina. However, that station has been modified to Channel 279C3 and a construction permit for operation on that channel has been granted. Therefore, final licensing on Channel 228A at Ocean Isle Beach may be delayed pending initiation of service by Station WDZD on Channel 279C3.

4. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Ocean Isle Beach, North Carolina		228A

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **March 17, 1994,** and reply comments on or before **April 1, 1994,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Gary S. Smithwick, Esq.
Shaun A. Maher, Esq.
Smithwick & Belendiuk, P.C.
1990 M Street, N.W., Suite 510
Washington, D.C. 20036
(Counsel to petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

[1] The coordinates for Channel 228A at Ocean Isle Beach are North Latitude 33-53-40 and West Longitude 78-28-26.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-255

In the Matter of

Amendment of Section 73.202(b), RM-8322
Table of Allotments,
FM Broadcast Stations.
(Titusville, Florida)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: December 30, 1993; Released: January 25, 1994

By the Acting Chief, Allocations Branch:

1. At the request of Southern Starr Limited Partnership ("petitioner"), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 8 FCC Rcd 7097 (1993), proposing the substitution of Channel 251C1 for Channel 251C2 at Titusville, Florida, and the modification of Station WGNE(FM)'s license to specify the higher class channel. Petitioner filed comments and reply comments reaffirming its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by substituting Channel 251C1 for Channel 251C2 at Titusville, Florida, as it would provide the community with a wider coverage area FM service. Channel 251C1 can be allotted to Titusville in compliance with the Commission's minimum distance separation requirements with a site restriction of 23.6 kilometers (14.6 miles) southeast[1] of the community. In accordance with Section 1.420(g) of the Commission's Rules, we will modify petitioner's license for Station WGNE(FM) to specify operation on Channel 251C1 at Titusville, Florida.

3. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 10, 1994,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Titusville, Florida	251C1

4. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station WGNE(FM), Titusville, Florida, IS MODIFIED, to specify operation on Channel 251C1 in lieu of Channel 251C2, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

5. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Southern Starr Limited Partnership, licensee of Station WGNE(FM), is required to submit a rule making fee in addition to the fee required for the application to effect the upgrade.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 251C1 at Titusville are North Latitude 28-35-00 and West Longitude 80-34-10.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-206

In the Matter of

Amendment of Section 73.202(b), RM-8284
Table of Allotments,
FM Broadcast Stations.
(Hermantown, Minnesota)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: December 30, 1993; Released: January 25, 1994

By the Acting Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 8 FCC Rcd 4917 (1993), issued in response to a petition filed by Bruce F. Elving ("petitioner"). The *Notice* proposed the allotment of Channel 221A to Hermantown, Minnesota, as that community's first local broadcast service. Petitioner filed comments reaffirming its interest in the allotment of Channel 221A at Hermantown, Minnesota. No other comments were received.

2. We believe the public interest would be served by allotting Channel 221A to Hermantown, Minnesota, as it will provide the community with its first local broadcast service. Channel 221A can be allotted to Hermantown consistent with the minimum distance separation requirements of the Commission's Rules provided there is a site restriction 2 kilometers (1.2 miles) northeast of the community.[1] The site restriction will prevent a short spacing to Channel 221A, Station WCMP-FM, Pine City, Minnesota. Since Hermantown is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government has been obtained for this allotment.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 10, 1994**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Hermantown, Minnesota	221A

4. The window period for filing applications for Channel 221A at Hermantown, Minnesota, will open on **March 11, 1994**, and close on **April 11, 1994**.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 221A at Hermantown are 46-48-47 North Latitude and 92-14-51 West Longitude.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-256

In the Matter of

Amendment of Section 73.202(b),	RM-8326
Table of Allotments,	
FM Broadcast Stations.	
(Taylorville, Illinois)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: December 30, 1993; Released: January 25, 1994

By the Acting Chief, Allocations Branch:

1. At the request of Miller Communications, Inc. ("petitioner"), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 8 FCC Rcd 7099 (1993), proposing the allotment of Channel 232A to Taylorville, Illinois, as that community's second local aural FM transmission service. Petitioner filed comments restating its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by allotting Channel 232A to Taylorville as that community's second local FM service. Channel 232A can be allotted to Taylorville in compliance with the Commission's minimum distance separation requirements with a site restriction of 7.2 kilometers (4.5 miles) south,[1] in order to avoid short-spacings to the licensed sites of Station WRMS(FM), Channel 232A, Beardstown, Illinois, and Station WLRW(FM), Channel 233B, Champaign, Illinois.

3. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 10, 1994**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Taylorville, Illinois	224B1, 232A

4. The window period for filing applications on Channel 232A at Taylorville, Illinois, will open on **March 11, 1994**, and close on **April 11, 1994**.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. Questions related to the application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 232A at Taylorville are North Latitude 39-29-22 and West Longitude 89-19-45.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-239

In the Matter of

Amendment of Section 73.202(b) RM-8313
Table of Allotments,
FM Broadcast Stations.
(Quincy, Washington)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: December 30, 1993; Released: January 25, 1994

By the Acting Chief, Allocations Branch:

1. At the request of Quincy Community Radio ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 8 FCC Rcd 6253 (1993), proposing the allotment of Channel 240C3 at Quincy, Washington, as its second local FM transmission service. Petitioner filed comments in support of the proposal reaffirming its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by allotting Channel 240C3 at Quincy, since it would provide the community with its second local FM transmission service. Channel 240C3 can be allotted to Quincy in compliance with the Commission's minimum distance separation requirements with a site restriction of 3.5 kilometers (2.2 miles) northeast to avoid a short-spacing to Station KLTX, Channel 239C, Seattle, Washington.[1] Since Quincy is located within 320 kilometers (200 x miles) of the U.S.-Canadian border, concurrence by the Canadian government has been obtained.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 10, 1994**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Quincy, Washington	244A, 240C3

4. The window period for filing applications will open on **March 11, 1994**, and close on **April 11, 1994**.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 240C3 at Quincy are North Latitude 47-15-13 and West Longitude 119-48-58. As indicated in the *Notice*, the coordinates for Channel 240C3 at Quincy are short-spaced to Station KULE-FM, Channel 240A, Ephrata, Washington. However, the license of Station KULE-FM was modified to specify operation on Channel 222C2 in the context of MM Docket No. 87-326. *See* 4 FCC Rcd 307 (1989). Therefore, the issuance of a license for Channel 240C3 at Quincy may be withheld until Station KULE-FM is licensed on Channel 222C2 at the site specified in its application for construction permit. We will serve the licensee of Station KULE-FM with a copy of this *Re port and Order*.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-165

In the Matter of

Amendment of Section 73.202(b), RM-8247
Table of Allotments,
FM Broadcast Stations.
(Athens, Ohio)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: December 30, 1993; Released: January 25, 1994

By the Acting Chief, Allocations Branch:

1. At the request of James Phillips ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 8 FCC Rcd 4122 (1993), proposing the allotment of Channel 240A to Athens, Ohio, as the community's second local commercial FM channel. Petitioner and W. Lawrence Patrick ("Patrick") each filed comments supporting the allotment and stating an intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by allotting 240A to Athens since an interest has been expressed in providing the community with a second local commercial FM service.

Technical Summary

3. Channel 240A can be allotted to Athens in compliance with the Commission's minimum distance separation requirements with a site restriction of 11.6 kilometers (7.2 miles) east-northeast to avoid short-spacings to Station WHOK, Channel 238B, Lancaster, Ohio, and Station WKWS, Channel 241B, Charleston, West Virginia.[1] Canadian concurrence in the allotment has been received since Athens is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 10, 1994**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Athens, Ohio	240A, 288A

5. The window period for filing applications for Channel 240A will open on **March 11, 1994**, and close on **April 11, 1994**.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 240A at Athens are North Latitude 39-22-08 and West Longitude 81-58-42.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-103

In the Matter of

Amendment of Section 73.202(b), RM-8206
Table of Allotments,
FM Broadcast Stations.
(Minetto, New York)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: December 30, 1993; Released: January 25, 1994

By the Acting Chief, Allocations Branch:

1. At the request of Francis G. Toce ("petitioner" or "Toce"), the Commission has before it the *Notice of Proposed Rule Making*, 8 FCC Rcd 2813 (1993), proposing the allotment of Channel 293A to Minetto, New York, as the community's first local FM service. Comments were filed by the petitioner reiterating his intention to apply for the channel and by Tia A. Soliday ("Soliday"). Reply comments were filed by the petitioner.

2. Soliday is the permittee of Station WWLF-FM at Copenhagen, New York. She states that the coordinates specified in the *Notice of Proposed Rule Making* result in a short-spacing to the coordinates specified in her pending construction permit application (BMPH-930310IB) to modify Station WWLF-FM's facilities from Channel 294A to Channel 294C3.[1] However, she states that both requests can be accommodated if the Minetto allotment is made at a site 6.7 kilometers west of the community. Toce has no objection to the use of the alternate coordinates provided that the alternate coordinates do not prohibit him, pursuant to Section 73.215 of the Commission's Rules, from submitting an application specifying the coordinates proposed in the petition for rule making.

3. We believe the public interest would be served by allotting Channel 293A to Minetto, New York, since it could provide the community with its first local aural transmission service. It is Commission policy to accommodate timely filed applications which conflict with rule making proposals whenever possible. *See Hardinsburg, Kentucky*, 7 FCC Rcd 1746 (1992) (when possible, we have modified a rule making proposal to specify an alternate site or channel to accommodate an application). Therefore, we will allot Channel 293A to Minetto at the coordinates proposed by Soliday.[2]

Technical Summary

4. Channel 293A can be allotted to Minetto in compliance with the Commission's minimum distance separation requirements, with respect to domestic allotments, with a site restriction of 10.9 kilometers (6.7 miles) northwest to avoid a short-spacing to the pending application for Channel 294C3 at Copenhagen, New York (BMPH-930310IB).[3] This allotment is short-spaced to Station CJBC5F, Channel 292B, Peterboro, Ontario, and to vacant Channel 293A at Brockville, Ontario, Canada. However, since Minetto is located within 320 kilometers (200 miles) of the U.S.-Canadian border, Canadian concurrence has been received for the allotment of Channel 293A as a specially negotiated allotment.

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 10, 1994,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Minetto, New York	293A

6. The window period for filing applications will open on **March 11, 1994,** and close on **April 11, 1994.**

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] Soliday's application and Toce's petition were filed with the Commission on the same day.

[2] We note that petitioner has stated his desire to submit an application specifying coordinates which would require a waiver of the Commission's minimum distance separation requirements pursuant to Section 73.215 of the Rules. This action does not in any way prejudge the acceptability of such an application.

[3] The coordinates for Channel 293A at Minetto are North Latitude 43-24-40 and West Longitude 76-36-40.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MOBILCOM PITTSBURG, INC. File No. LMK-92049

For Renewal of License

ORDER

Adopted: January 11, 1994; Released: January 28, 1994

By the Commission:

1. On January 12, 1993, we released a *Memorandum Opinion and Order*, FCC 92-571, 8 FCC Rcd 351 (1993) (*MO&O*), in which we denied Mobilcom Pittsburg, Inc.'s (Mobilcom's) Application for Review of a Private Radio Bureau decision[1] renewing two of five channels previously authorized to Mobilcom's Specialized Mobile Radio (SMR) system, WNGC-453. The other three channels were not timely loaded by Mobilcom, and, pursuant to Section 90.631(b) of the Commission's Rules, 47 C.F.R. § 90.631(b), Mobilcom's authority to use those channels canceled automatically.[2] Mobilcom now requests that, pending its appeal of the *MO&O* to the U.S. Court of Appeals for the D.C. Circuit,[3] we reinstate Mobilcom's renewal application and retain that application in pending status. We deny Mobilcom's request.

2. Mobilcom's current request[4] is an attempt to have reinstated its renewal application for all five channels, by staying the Bureau's ministerial issuance of the superseding license for the two channels Mobilcom remains authorized to operate in accordance with the *MO&O*.[5] Mobilcom argues that, pending resolution of its judicial appeal, there has been no "final determination" of the status of its renewal application and that, therefore, "Mobilcom's license for all five channels ... lawfully continues in full force and effect."[6] Mobilcom maintains that, "in this context," "final determination" per Section 558(c) of the Administrative Procedure Act, 5 U.S.C. § 558(c), and Section 1.62(a)(1) of the Commission's Rules, 47 C.F.R. § 1.62(a)(1), means "a ruling that is no longer subject to reconsideration by the agency or reversal on review by an appellate tribunal."[7] This is incorrect. Section 558(c) of the Administrative Procedure Act speaks only of preserving a license pending a final determination by the *agency*, and Section 1.62(a)(1) of our Rules similarly indicates that a license will remain in force "until such time as the Commission shall make a final determination with respect to the renewal application." Finality of *agency* action is determined by assessing "whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties."[8] In the present instance, the Commission has, by its *MO&O*, taken definitive action through renewal of Mobilcom's two remaining channels. Moreover, by operation of law, *see* 47 C.F.R. § 90.631(b), even prior to the license renewal, Mobilcom had authority for only two channels.

3. In addition, Mobilcom states that, under Section 1.65(a) of the Commission's Rules, 47 C.F.R. § 1.65(a), Mobilcom's renewal application remains "pending" throughout Mobilcom's appeal and that no "final determination" has occurred.[9] Section 1.65(a) is inapposite. This section refers only to the applicant's continuing obligation to ensure "the continuing accuracy and completeness of information furnished in a pending application or in Commission proceedings involving a pending application." 47 C.F.R. § 1.65(a). The fact that a proceeding remains pending in that context until court review is completed does not mean a proceeding remains pending for other purposes.

4. Mobilcom also argues that, pending resolution of its appeal, we should permit Mobilcom and its customers to use the three affected channels because Mobilcom can now allegedly demonstrate greater potential loading of those channels.[10] We addressed this issue, which goes to the integrity of our channel loading and recovery program, in the *MO&O*,[11] and need not discuss it further here.

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[1] On March 11, 1992, the Private Radio Bureau issued a letter order denying Mobilcom's Petition for Reconsideration.

[2] 8 FCC Rcd at 351, paras. 3-6. In such circumstances, notification of the automatic cancellation of channels is warranted and the licensee's contingent right to such channels never vests to become an unqualified right. *See, e.g.*, P & R Temmer v. FCC, 743 F.2d 918, 928 (D.C. Cir. 1984).

[3] Notice of Appeal, Mobilcom Pittsburg, Inc. v. FCC, No. 93-1156, filed February 11, 1993. Mobilcom's appeal notes issues not relevant to this present discussion.

[4] Rejection of Partial Grant and Petition for Reconsideration and Reinstatement of Renewal Application, filed May 26, 1993 (hereinafter Petition).

[5] The Bureau's ministerial act of issuing the superseding license did not constitute separate Commission action. It did, however, have the effect of commencing the 6-month period during which Mobilcom would not be placed on the "waiting list" for additional channels in its service area. *See* 47 C.F.R. § 90.611(d). We intended to reference this rule in the *MO&O; see* 8 FCC Rcd at 352 n.7 . The six-month waiting period referred to in 47 C.F.R. § 90.631(b), which was cited in note 7 of the *MO&O*, begins with the automatic cancellation of channels.

[6] Petition, *supra* note 4, at 3-4.

[7] *Id.* at 2.

[8] Franklin v. Massachusetts, -- U.S. --, 112 S. Ct. 2767, 2773, 120 L. Ed.2d 636, 648 (1992). Stated differently, the test for finality is whether "administrative orders ... impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process." Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 113 (1948) (citations omitted), and whether judicial review would disrupt any additional agency proceedings, Bell v. New Jersey, 461 U.S. 773, 779-80 (1983) (citations omitted). *See also* City of Gallup v. FERC, 702 F.2d 1116, 1122-23 (D.C. Cir. 1983). *See generally* B. Mezines, J. Stein, & J. Gruff, 5 Administrative Law § 48.03 (rev. ed. 1985).

[9] Petition, *supra* note 4, at 3.

[10] *Id.* at 4-5.

[11] 8 FCC Rcd at 351-52, para. 8 (requesting waiver relief). *See generally* P & R Temmer v. FCC, 743 F.2d 918, 929-32 (D.C. Cir. 1984).

5. For the reasons noted above, Mobilcom's petition[12] IS DISMISSED.

6. Mobilcom's petition specifically rejected the superseding license issued to Mobilcom on April 26, 1993. Thus, Mobilcom has been operating without any authority since that date. In order to avoid disruption of service to the public on Mobilcom's two authorized channels, we therefore direct that the Licensing Division of the Private Radio Bureau SHALL REISSUE a superseding license to Mobilcom for its remaining two channels *nunc pro tunc* as of the date of the *MO&O*. Further unauthorized operation by Mobilcom may well lead to initiation of forfeiture proceedings.

7. For further information regarding this *Order*, contact Eric Malinen, Private Radio Bureau, Land Mobile and Microwave Division, (202) 632-6497.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[12] *See* note 4, *supra*.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: January 18, 1994

QUESTION POOL RELEASED FOR GLOBAL MARITIME DISTRESS AND SAFETY SYSTEM (GMDSS) RADIO MAINTAINER LICENSE EXAMINATION

The FCC today released the question pool for Commercial Radio Operator written examination Element 9. Passing Element 9, in addition to the previously released Elements 1 and 3, is a requirement for a GMDSS Radio Maintainer license.

Copies of released question pools are available through the Commission's duplicating contractor, International Transcription Services, Inc., 2100 M Street, N.W., Washington, DC 20037 (202) 857-3800. Copies are not available from the FCC. A printed copy of each released element is available for viewing during business hours in the Special Services Division, Rm. 5322, 2025 M Street NW, Washington, DC. (202) 632-7197, and in the Public Reference Room, Licensing Division, 1270 Fairfield Road, Gettysburg, PA (717) 337-1212.

Commercial Operator License Examination Managers must use questions from these question pools when preparing the question sets they administer to examinees. Each pool contains at least five times the number of questions that are asked on one question set. The minimum passing score for Element 9 is 38 correct answers on a 50 question set.

Question pools for other written examination elements will be released by Public Notice as they are compiled.

For further information, call Ms. J. Joy Alford at (202) 632-4964.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications Transmittal No. 6162
Tariff F.C.C. No. 1
SelectCall Service

ORDER

Adopted: January 21, 1994; Released: January 21, 1994

By the Chief, Tariff Division, Common Carrier Bureau:

1. On December 3, 1993, AT&T Communications (AT&T) filed the above-captioned tariff revisions on 45 days' notice. This filing introduces SelectCall, an AT&T long distance service that permits customers to receive direct dialed calls originated over the AT&T network from subscriber-authorized telephone numbers and have those calls automatically reverse-billed to the customer without the assistance of a company operator. The customer must supply AT&T with the specific telephone numbers, a maximum of five, that the customer will pay for all calls originated from these numbers and terminated on the customer's telephone number.

2. The transmittal is currently scheduled to take effect on January 24, 1994. On December 17, 1993, Tel-Save, Inc. filed a petition to reject, or to suspend and investigate, Transmittal No. 6162. AT&T filed a reply on December 23, 1993. On January 13, 1994, AT&T filed an application for special permission to waive the requirements of Section 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. Sections 61.58 and 61.59, to make effective on not less than three days' notice, revisions to Tariff Transmittal No. 6162. Specifically, the filing adds a requirement that subscribers to SelectCall obtain prior approval from the parties they designate for the plan and also expands the availability of SelectCall to customers in all equal access area of local exchange companies that can bill the service for AT&T.

3. The Common Carrier Bureau has reviewed AT&T Communications Transmittal No. 6162, Tel-Save Inc.'s petition, AT&T's reply and the application for special permission. We conclude that the filing does not warrant rejection because it does not, on its face, conflict with a statute or with an agency regulation or order and no question has been presented that warrants investigation at this time.

4. Accordingly, IT IS ORDERED that the petition to reject, or to suspend and investigate, AT&T Communications Tariff F.C.C. No. 12, Transmittal No. 6162 filed by Tel-Save Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications Transmittal No. 6282
Tariff F.C.C. No. 2

ORDER

Adopted: January 14, 1994; Released: January 14, 1994

By the Chief, Tariff Division, Common Carrier Bureau:

1. On December 23, 1993, AT&T Communications (AT&T) filed the captioned tariff revisions on 14 days' notice. This filing introduces an 800 Customer Specific Term Plan II (CSTP II) promotion in which AT&T offers a usage credit to existing or new term plan customers who subscribe to a new or upgraded CSTP II. The transmittal is currently scheduled to take effect on January 15, 1994.

2. On December 29, 1993, The Furst Group, Inc., and Winback and Conserve Program, Inc., filed petitions to reject or suspend and investigate Transmittal No. 6282. On January 7, AT&T filed a reply, accompanied by a motion to accept the late-filed reply.[1]

3. The Common Carrier Bureau has reviewed AT&T Communications Transmittal No. 6282 and the related pleadings. We conclude that the filing does not warrant rejection because it does not, on its face, conflict with a statute or with an agency regulation or order. We further conclude that the petition does not demonstrate that an investigation is warranted at this time.

4. Accordingly, IT IS ORDERED that the petitions to reject or suspend and investigate AT&T Communications Tariff F.C.C. No. 2, Transmittal No. 6282, filed by The Furst Group, Inc. and the Winback and Conserve Program, Inc. ARE DENIED.

5. IT IS FURTHER ORDERED that the motion to accept the late-filed reply, filed by AT&T Communications, Inc., IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

[1] The Bureau will grant AT&T's motion as no party will be harmed by the delay.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-155

In re Application of

RICHARD BOTT II File No. BAPH-920917GO
(Assignor)

and

WESTERN COMMUNICATIONS, INC.
(Assignee)

For Assignment of Construction Permit
of Station KCVI(FM), Blackfoot, Idaho

Appearances

James P. Riley, Esquire, Anne G. Crump, Esquire, and *Kathleen Victory, Esquire,* on behalf of Richard Bott, II; *Lester W. Spillane, Esquire,* and *David D. Oxenford, Esquire,* on behalf of Western Communications, Inc.; and *Norman Goldstein, Esquire,* and *Y. Paulette Laden, Esquire,* on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

SUMMARY DECISION OF ADMINISTRATIVE LAW JUDGE ARTHUR I. STEINBERG

Issued: January 19, 1994; Released: January 28, 1994

PRELIMINARY STATEMENT

1. By *Hearing Designation Order and Notice of Opportunity for Hearing,* 8 FCC Rcd 4074 (1993) (*"HDO"*), the Commission designated for hearing the above-captioned application of Richard Bott, II ("Bott") and Western Communications, Inc. ("Western"), for assignment of the construction permit of Station KCVI(FM), Blackfoot, Idaho. The following issues were specified:

> (a) To determine whether Richard P. Bott II has misrepresented facts to or lacked candor with the Commission, either in connection with his integration pledge presented in the course of the Blackfoot, Idaho comparative hearing proceeding, or in his opposition to the petition to deny filed in the instant proceeding.
>
> (b) To determine, in light of the evidence adduced pursuant to issue (a), whether Richard P. Bott II is qualified to remain a Commission permittee.
>
> (c) To determine, in light of the evidence adduced pursuant to the foregoing issues, whether the captioned application should be granted.

(*HDO* at para. 14.) In accordance with Section 309(e) of the Communications Act of 1934, as amended ("Act"), the burden of proceeding with the initial presentation of the evidence and the burden of proof with respect to all of the issues were placed on Bott. (*Id.* at para. 17.)

2. The *HDO* further stated that, irrespective of whether the hearing record warrants an order denying the assignment application, it shall be determined pursuant to Section 503(b) of the Act whether an order of forfeiture in an amount not to exceed $250,000 shall be issued against Bott for willful and repeated violations of Section 73.1015 of the Commission's Rules (submitting truthful written statements and responses to the Commission). (*Id.* at para. 15.)

3. A prehearing conference in this proceeding was held on July 20, 1993. A hearing was held in Washington, D.C., on October 26, 1993. The record was initially closed at the end of the hearing. (Tr. 193; *Order,* FCC 93M-683, released October 28, 1993.) However, by *Order,* FCC 93M-700, released November 10, 1993, the record was reopened for the receipt of an additional exhibit, and was then reclosed.

4. By *Order,* FCC 93M-686, released October 29, 1993, Bott was given permission to file a post-hearing motion for summary decision. Bott filed his Motion for Summary Decision on December 6, 1993. The Mass Media Bureau filed comments in support of Bott's motion on December 9, 1993. For the reasons which follow, Bott's motion will be granted, Issues (a) through (c) will be resolved in Bott's favor, and the assignment application will be granted. In addition, since the record reflects no violation of Section 73.1015 of the Rules, no order of forfeiture will be issued.

FINDINGS OF FACT

Background

5. On July 11, 1985, Bott filed an application for a construction permit ("CP") for a new FM station in Blackfoot, Idaho. (Tr. 89.) Competing applications were filed by six other applicants, including Radio Representatives, Inc. ("RRI"). By *Hearing Designation Order,* 2 FCC Rcd 3897, released July 1, 1987, the applications of Bott, RRI, and three of the other applicants were designated for comparative hearing. The hearing was held on December 7, 1987. (MMB Ex. 2.) During the hearing, Bott claimed, and received, an integration preference based on his commitment to move to Blackfoot and serve as the full-time general manager of his proposed station. (MMB Ex. 1; MMB Ex. 3, pp. 21, 28; Bott Ex. 3, pp. 20, 22.) Bott's CP application was granted and that of RRI and one other applicant were denied on the basis of Bott's integration preference. *Initial Decision,* 3 FCC Rcd 7094, 7099 (ALJ 1988). Although RRI appealed to the Review Board and the Commission, the determination reached in the *Initial Decision* was upheld. *Richard P. Bott, II,* 4 FCC Rcd 4924 (Rev. Bd. 1989), *rev. denied* 5 FCC Rcd 2508 (1990). RRI's subsequent appeal to the U.S. Court of Appeals was also denied. *Radio Representatives, Inc. v. FCC,* 926 F.2d 1215 (D.C. Cir. 1991) (*aff'd by judgment*).

6. Bott was issued the CP for his proposed Blackfoot facility on December 18, 1991. (Joint Ex. 1, p. 2.) On September 17, 1992, Bott filed the above-captioned application to assign that permit to Western. (Official notice taken.) A Petition to Deny the assignment application was filed by RRI on October 26, 1992. (MMB Ex. 3.) Bott filed an Opposition to Petition to Deny on November 10, 1992 (MMB Ex. 4), to which RRI filed a Reply to Opposition to

Petition to Deny on November 23, 1992 (MMB Ex. 5). On December 8, 1992, Bott filed a Request for Leave to Respond and Response. (MMB Ex. 6.) RRI filed a Supplement to Petition to Deny on May 14, 1993 (MMB Ex. 7), and by letter dated May 19, 1993, then counsel for Bott notified the Commission that no response to the Supplement would be filed (MMB Ex. 8). The *HDO* in this proceeding followed from this series of pleadings.

Bott's Integration Commitment and Preparation for Construction

7. Bott filed his Blackfoot application on July 11, 1985. (Tr. 89.) On the same date, Bott also filed an application for a new FM station in Central Valley, California. (*Hearing Designation Order*, 2 FCC Rcd 2826, released May 15, 1987; official notice taken of filing date.) Bott selected Blackfoot and Central Valley from the list of communities in the FM universal filing window notice after considering the coverage of the proposed facilities, the populations, the number of stations, and the competitive situation in these markets. Based upon these considerations, Bott felt that these communities provided viable economic markets for a successful radio business venture. (MMB Ex. 2, pp. 85-86.) Bott specifically selected Blackfoot because it was a Class C facility, offering a significant business opportunity, located in an underserved market, in an area of the country in which he would enjoy living and working. (Tr. 144.) Bott did not conduct a formal study of the Blackfoot market. (Tr. 144-45.)

8. At the time he filed the Blackfoot application, Bott had not decided whether he would move to Blackfoot and be integrated full-time into the operation of the station. (MMB Ex. 2, p. 19.) Bott elected to propose full-time integration in the Blackfoot proposal in the summer of 1987 when both the Blackfoot and Central Valley applications were designated for hearing. (MMB Ex. 2, p. 19; Bott Ex. 3, p. 14; MMB Ex. 4, p. 9; Tr. 151-52.) Bott made this decision based upon his assessment that the proposed Class C Blackfoot facility would be a more complicated operation with a substantially broader coverage area and would have a better "long-term profit potential" than the proposed Central Valley Class A station. According to Bott, the Blackfoot station would essentially cover two market areas, Idaho Falls and Pocatello, Idaho, rather than merely the city of license. Bott also felt Blackfoot would be a nice place to live. (MMB Ex. 2, p. 19; Tr. 84-85, 149-50.)

9. At the time he made the commitment to move to Blackfoot, Bott had never been to that community. However, he had vacationed in, was familiar with, and enjoyed the Rocky Mountain area. (Tr. 85-86, 152.) Bott had no family or friends in Blackfoot. (MMB Ex. 2, p. 72.) He did not intend to maintain a residence anywhere other than in Blackfoot. (MMB Ex. 2, pp. 72-73.)[1] Bott viewed the Blackfoot proposal as an opportunity to break away from the family broadcasting business,[2] to start and run his own business, to do his own programming, and to operate his own stations. (MMB Ex. 2, pp. 51, 68-69; Bott Ex. 3, p. 14; MMB Ex. 4, p. 9.) Bott was following in his parents' footsteps in this regard. His parents had previously worked for a station and elected to go out on their own by purchasing another station. (Tr. 130-31.)

10. On September 11, 1987, subsequent to the designation for hearing of the Blackfoot applications, Bott filed an Integration Statement in that proceeding. He represented that he would work full-time, 40 or more hours per week, as general manager of his proposed station. He further represented that he planned to establish his full-time residence in Blackfoot. (MMB Ex. 1.)

11. Bott visited Blackfoot in September 1987 to acquaint himself with the community and area in which he planned to live. While in Blackfoot he looked into housing and studio opportunities with a real estate agent, visited his then designated tower site, and met with the site manager. (MMB Ex. 2, p. 86-87; Tr. 91-94.) Bott also met with the mayor of Blackfoot, as well as representatives from the job service, a potato packaging plant (one of the main employers in the area), and the Bureau of Indian Affairs. Bott obtained literature on the city, its attributes and activities, and familiarized himself with types of community needs. He told the people with whom he met that he was planning to build a radio station in Blackfoot, and he discussed with them community service and public affairs and areas in which the radio station could help the community. He did not discuss formats. (Tr. 152-55.) Bott did not make a commitment to rent or purchase a particular house or studio space at that time but visited potential housing and studios to determine general availability. (Tr. 93.) He learned that obtaining office and studio space for the station, and a residence for himself, was not going to be a problem. (Tr. 99.) Bott did not return to Blackfoot during the course of the comparative hearing and the appeals. (Tr. 94.) He intended to return there, to work on his living and other arrangements, after finalizing his transmitter plans with the owner of his site. (Tr. 174-75.)

12. On December 7, 1987, a hearing was held to consider the proposals of the competing applicants in the Blackfoot proceeding. During the hearing, Bott testified that if he obtained the CP he intended to move to the community of license and be integrated full-time into the management and operation of the station. He also testified that he had no intention of selling the Blackfoot station, but intended to own and operate the station for an indefinite period of time. (MMB Ex. 1; MMB Ex. 2, pp. 72-73.)

13. As noted above, Bott's application for the Blackfoot facility was ultimately granted. Although the grant became final in the spring of 1991, the Blackfoot CP was not issued to Bott until December 18, 1991. (Joint Ex. 1, p. 2; Tr. 88.) Bott did not take steps toward commencing construction of the Blackfoot station until after the CP was issued because, as a result of his experience with the comparative hearing and all of the appeals, he was wary of taking any action until he had the CP in hand. (Tr. 103-04, 170-71.) In

[1] During the pendency of the Blackfoot application, and until the summer of 1993, Bott lived in a rental apartment in Kansas City. During the summer of 1993, he purchased and moved into a new home in a suburb of Kansas City. Bott has never been married. (Tr. 78, 142-43.)

[2] Bott and both of his parents, through Bott Broadcasting Company ("BBC") and Bott Communications, Inc. ("BCI"), own a number of radio stations. BBC is jointly owned by Bott's parents. BBC owns 80 percent of BCI and Bott owns 20 percent of BCI. Bott is an officer and director of both BBC and BCI, and is an employee of BBC. All of the stations owned by BBC and BCI operate with a commercial religious format. (Tr. 126-28, 143; MMB Ex. 9, p. 2.)

addition, after he was advised by his then counsel in March 1991 that the appeals of the CP grant had ended, the FCC staff required the submission by Bott of a radiofrequency radiation hazard statement before the CP would be issued. Bott submitted that statement, prepared at his request by a consulting engineer, in October 1991. (Joint Ex. 1.)

14. After the final grant, Bott did not lease or purchase studio space or a home in Blackfoot because he was more concerned with taking care of the antenna site arrangements. He believed that all other elements of the construction would follow from there. (Tr. 99, 174-75.)

15. In January 1992, Bott contacted the site agent, the Bureau of Land Management, to obtain an updated site management plan in order to assure himself that his tower plans were in compliance with the management plan. He also had discussions with the president of the users group at the transmitter site to determine whether a more advantageous tower site was available. He attempted to determine whether to side mount the antenna or to use a combiner and broadcast his signal and the signal of the other station operating from the tower through one antenna. In so doing, he conferred with his consulting engineer and an equipment supplier. Ultimately, Bott contacted Kent Frandsen, the tower owner, to make arrangements for his antenna installation. In January 1992, Bott also sought and received from the FCC authorization to use the call sign "KCVI" for the Blackfoot facility. (Tr. 95-96, 108-09; Bott Ex. 3, p. 16; MMB Ex. 4, p. 11.)

16. At the October 26, 1993, hearing in the instant proceeding, Bott affirmed that it was his intention at all times after 1987, during the pendency of the Blackfoot application, to move to Blackfoot and be fully integrated into the management of the station. It remained his intention to move to Blackfoot and be fully integrated until he decided to sell the CP in 1992. (Tr. 180.)

The Format Decision and the Decision to Sell the CP

17. Bott testified during the Blackfoot comparative hearing that he had not yet made a format decision for the Blackfoot station. (MMB Ex. 2, pp. 56, 89-90.) He stated that he would adopt a format "tailored to [the Blackfoot] market and the needs of that community." (*Id.* at 56.) In the instant hearing, Bott recalled and confirmed this testimony. (Tr. 86-87.) He explained that in considering Blackfoot, he reviewed the Broadcasting Yearbook listings for existing stations and formats in the market. However, format was not an overriding concern for him since formats change over time. When he filed for Blackfoot he had no particular or general idea how he would format the station. His hope was to build a facility which, through the sale of radio time, would be a profitable business enterprise. He expected to make the station profitable by finding an audience which was unserved, caring for and developing loyalty in that audience, and then marketing it to advertisers and others. (Tr. 145-49.)

18. Bott also testified in the comparative hearing that he would consider satellite-fed programming for his station, including some of the programs which were then being broadcast by BBC and BCI, in the event that such programming was compatible with whatever format he subsequently chose. However, Bott stated that he had not as yet chosen the exact format for his station. (MMB Ex. 2, pp. 62-63, 89-90.) Bott further stated that any programming he carried on the Blackfoot station would be selected for his own benefit and the benefit of the Blackfoot listenership, and not for the benefit of BBC or BCI. (*Id.* at p. 64.)

19. As of the time of the Blackfoot comparative hearing, Bott had had no specific discussions with his father relating to how Bott would program his station. (MMB Ex. 2, pp. 66-69.) His father, an experienced broadcaster, was a tremendous source of information for him. His father was concerned that Bott consider all the new formats that were available, including the newly developing satellite formats, and Bott and his father had conversations along those lines. (Tr. 131-32.) Bott intended to make his station independent of BBC. (Tr. 129.)

20. Realizing that a substantial period of time would elapse before the station would go on the air, Bott did not want to make a format decision prematurely, preferring instead to keep his format options open. (Tr. 87-88; Bott Ex. 3, p. 1.) All of Bott's broadcast experience, except for his experience with a college campus carrier station, had been with Bott family-owned broadcasting companies and their stations. (MMB Ex. 9, p. 2.) All of those stations operated commercially with a format of religious programs, news, and information. (Tr. 128.) However, Bott's knowledge of radio formats and their economics was broader. (Tr. 159-63.) This knowledge and experience, and his contacts in non-religious commercial broadcasting, provided the basis for Bott's belief that he could operate with any commercial format he chose, under the right circumstances. (Tr. 138-40.) According to Bott, the right circumstances included the number of stations in the market, their existing formats, community service attributes, and economic factors. Bott felt that economic considerations were foundational, that is, if the station could not operate at a profit it would not remain in existence. (Tr. 139-40.) Bott knew several individuals who operated commercial religious stations while also operating successfully other stations with different commercial formats. (Tr. 180-81.)

21. After the Court of Appeals decision became final in March 1991, Bott began the decision-making process to determine what format to use on his station. He considered this decision through the summer of 1991. (Tr. 90-91, 109, 156-57.) In making his decision he considered the market generally, the number and formats of stations in the market, and what viable format openings existed in the market. In addition to matters related to the market specifically, Bott considered the state of the national economy and the radio broadcast industry overall. Through reading newspapers, magazines and various trade publications, he became aware that the national and regional economies, as well as the national and Rocky Mountain regional radio business, were in a depressed state. (Tr. 90-91, 157; Bott Ex. 3, pp. 2, 8-13.)

22. Bott decided to adopt a commercial religious format. He did so largely because of the depressed state of the economy and the downturn in the radio industry. (Tr. 109-10, 158-59; MMB Ex. 4, p. 10.) Some of the other formats that he considered were Satellite Music Network, Unistar, country, soft adult contemporary, adult contemporary, Z-rock, contemporary hit radio, talk radio, and business radio. (Tr. 109, 159-60.) While he was aware of many of these formats in 1985 when he applied for Blackfoot, the thing that was different in 1991 when he made his format decision was the depressed state of the economy and the indications that it would get worse rather than better. (Tr. 163-64.)

23. The other formats which Bott considered relied substantially upon spot advertising. Based upon his experience, he knew that a commercial religious format relied primarily upon the sale of blocks of time rather than spot ad-

vertising sales. Bott felt that, although a commercial religious format did not maximize the profit potential of a station, such a format stood a greater chance of being economically viable in a depressed economy. (Tr. 109-10, 111-12, 162-63.) He knew that no other station operating in the market that the Blackfoot station would serve had a commercial religious format in the summer of 1991. (Tr. 166; Bott Ex. 3, p. 2.) Bott believed that he could make a success of operating the Blackfoot station with a commercial religious format. (Tr. 112; Bott Ex. 3, pp. 2-3.)

24. While in California for the purpose of attending a regional religious broadcasters convention in late September 1991, Bott learned from a time buyer, Teresa Rivera, that the Calvary Chapel Church had recently purchased FM station KRSS, Chubbock, Idaho, and was planning to go on the air with a commercial religious format and an increase in power. (Tr. 112-13, 164-68; Bott Ex. 3, p. 3; MMB Ex. 4, p. 10.) Bott was immediately concerned and called Lou Phelps, a former assistant to Rivera, who had moved to Pocatello to operate the station. (Tr. 113-14.) Bott discussed with Phelps KRSS's plans to increase power from a mountaintop site, its prospective coverage from that site, and its format. (Tr. 114, 167-68.) Based upon these conversations, his knowledge of broadcast engineering concepts generally, and his prior experience with a mountaintop site, Bott believed that KRSS's signal would serve substantially the same market that his Blackfoot station would try to serve, that is, the area from Idaho Falls in the north to Pocatello in the south. (Tr. 113-17, 119; Bott Ex. 3, pp. 3-4.)[3]

25. Bott was very distressed. (Tr. 117, 168.) He believed that two commercial religious stations would not be viable in the Idaho Falls-Pocatello market considering its size and demographic make up. (Tr. 168-70.) In addition, KRSS was in a position to be on the air before Bott's Blackfoot station. (Tr. 118; Bott Ex. 3, p. 15; MMB Ex. 4, p. 10.) Further, KRSS planned to broadcast many of the same programs Bott had intended to use, and there were only a finite number of such programs available. Even if Bott had sold time to competitive programs, the audience would have been split. Consequently, Bott believed he could not sustain a financially viable operation. (Tr. 167-70.)

26. Bott considered format alternatives but, faced with a start-up operation in a very depressed economy, he believed that he would be financially unsuccessful operating a new radio station with a format relying heavily upon spot advertising. (Tr. 117-18.) Nevertheless, Bott continued with his plans to build the station in the hope that either the economy would turn around and an alternative format would become viable, or that KRSS might not be able to effectuate its power increase proposal. (Tr. 118-19, 175-76; Bott Ex. 3, p. 16; MMB Ex. 4, p. 11.)[4]

27. In the spring of 1992, Kent Frandsen, the tower owner, suggested to Bott that if the FCC were to change its duopoly rules he would be interested in purchasing Bott's Blackfoot CP. (Bott Ex. 3, p. 16; MMB Ex. 4, p. 11; Tr. 110-11, 120-21.) Bott advised Frandsen that his CP was not for sale and that he intended to move to Blackfoot and construct and operate the station. (Tr. 111, 121; Bott Ex. 3, p. 16; MMB Ex. 4, p. 11.) Bott had not considered selling the CP at any time prior to this discussion with Frandsen. (Tr. 111, 121.)

28. In a subsequent conversation, Frandsen again indicated his interest in purchasing Bott's CP. Bott realized that a duopoly operation of his Blackfoot station, with all of its inherent efficiencies and economies, might be the best way of successfully operating the station. (Tr. 121, 176-77; Bott Ex. 3, p. 16; MMB Ex. 4, p. 11.) As a result, Bott discussed with his then FCC counsel whether he could sell the permit. Counsel advised him that he could sell the permit for his expenses. (Tr. 121-22, 180; Bott Ex. 3, p. 16; MMB Ex. 4, p. 11.)

29. Having concluded that his proposed Blackfoot station was no longer an economically viable business venture, and with his attorney's advice that he could sell the permit for his expenses, Bott agreed to sell the CP to Western, Frandsen's company. (Bott Ex. 3, p. 16; MMB Ex. 4, p. 11; Tr. 180.) The assignment application was filed with the Commission on September 17, 1992. (Official notice taken.)

The Pre-Designation Pleadings and the *HDO*

30. As noted above, RRI filed a Petition to Deny the assignment application. RRI contended that the assignment application must be designated for hearing pursuant to Section 73.3597(a) of the Commission's Rules because Bott proposed to assign his construction permit within one year of its grant, and Bott would, therefore, be abandoning the commitment he made in the comparative hearing to relocate to Blackfoot and integrate ownership and management. (MMB Ex. 3.) RRI further argued that a grant of the assignment application "would undermine the very foundation of the Commission's comparative hearing process." (*Id.* at p. 7.)

31. In his Opposition to Petition to Deny, Bott stated in a declaration under penalty of perjury that throughout the comparative hearing process "it remained |his| intention and plan to build the station in Blackfoot, move there and personally run the station full time if and when |he| received the C.P." (MMB Ex. 4, p. 9.) Bott's declaration also stated that *after* the CP grant was affirmed by the Court of Appeals in February 1991, he "proceeded with more detailed planning for the station |and| . . . decided that |he| would operate the station with a religious format." (*Id.* at pp. 9-10.) Bott's declaration further outlined the impact of the information he received in late September 1991 about the plans for station KRSS, and stated that throughout the remainder of 1991 and into 1992 he proceeded with planning for construction of his station, ultimately contacting Frandsen "to proceed with my plans to install my antenna on his tower." (*Id.* at p. 11.) In addition, Bott's declaration stated that Frandsen inquired about purchasing the CP and, after first telling him it was not for sale, Bott elected to sell the CP after his then attorney advised him that the FCC allowed him to do so provided that he receive as compensation only his expenses. (*Id.*) Bott stated in his declara-

[3] Bott's belief that the signal of KRSS would reach this area was ultimately shown to be correct. (Bott Ex. 2.)

[4] KRSS was authorized to operate with increased power, and went on the air from its new facilities on April 6, 1992. (MMB Ex. 6, pp. 2, 4-10.)

tion that he thought that in the poor economy a duopoly operation, as Frandsen would operate the Blackfoot station, represented the best hope for a successful operation. *(Id.)*

32. RRI filed a Reply to Opposition to Petition to Deny. In the "Summary" section of the Reply RRI stated: "For the first time, Bott has revealed that his integration pledge has always been contingent on his ability to establish a profitable, religious station, which itself is inconsistent with the integration pledge made in this proceeding." (MMB Ex. 5, p. 2.) Similarly, in the "Background" portion of the Reply, RRI further stated that: "Bott claim|ed| that he pursued the permit in order to construct a commercial religious station, . . ." (*Id.* at p. 7.) It is noted, however, that the statements attributed to Bott by RRI were not contained in Bott's Opposition or in his declaration. (MMB Ex. 4.)

33. The *HDO* in this proceeding designated a misrepresentation/lack of candor issue against Bott. In its rationale for the specification of this issue, the *HDO* asserted that, in opposing RRI's Petition to Deny, "Bott state|d| that throughout the six-year effort to obtain his permit he maintained a good faith intention to *both* move to Blackfoot *and operate KCVI as a commercial facility with a religious format.* " (*HDO* at para. 3; emphasis added.) The *HDO* further maintained that "Bott ha|d| represented in the instant proceeding that, throughout the comparative proceeding, *he always intended to operate with a commercial religious format* . . ." (*Id.* at para. 9; emphasis added.) However, as indicated above, neither the Opposition nor Bott's declaration contained these, or similar, statements. (MMB Ex. 4.) In this regard, the Mass Media Bureau acknowledged that it:

> does not possess a copy of a written statement or transcript of an oral representation by Bott to the Commission in which Bott asserts that throughout the six-year effort to obtain his permit he maintained a good faith intention to operate KCVI as a commercial facility with a religious format or that throughout the comparative proceeding, he always intended to operate with a commercial religious format.

(Bott Ex. 1, pp. 4-5.)

CONCLUSIONS OF LAW

34. This proceeding was designated for hearing to determine whether Richard Bott, II misrepresented facts to or lacked candor with the Commission either in connection with the integration pledge he made during the course of the Blackfoot, Idaho, comparative proceeding, or in an Opposition to Petition to Deny he filed in this proceeding. The findings of fact establish, and it is concluded, that Bott did not misrepresent facts to or lack candor with the Commission. It is further concluded that Bott is qualified to remain a Commission permittee, and that the public interest would be served by a grant of the above-captioned assignment application.

35. Turning first to the statements Bott is alleged to have made in his Opposition to Petition to Deny, the record establishes that those statements were not made by Bott. Specifically, the *HDO* attributed to Bott the statement that "throughout the six-year effort to obtain his permit he maintained a good faith intention to *both* move to Blackfoot *and operate KCVI as a commercial facility with a religious format.*" (Emphasis added.) The *HDO* also attributed to Bott the representation that "throughout the comparative proceeding, *he always intended to operate with a commercial religious format* . . ." (Emphasis added.) However, the italicized statements were not made by Bott in his Opposition, or anywhere else. On the contrary, the statements in question appear to have been derived from the "Summary" and "Background" portions of RRI's Reply to Opposition to Petition to Deny, which contained grossly inaccurate characterizations of Bott's actual statements.

36. Turning next to Bott's integration pledge in the Blackfoot comparative hearing, the findings establish that such pledge was made in good faith, that Bott intended to fulfill his pledge, that he took concrete and significant steps to do so, and that he did not misrepresent facts or lack candor with respect to his pledge. Bott originally proposed to be integrated in the Blackfoot facility, instead of another facility for which he applied, for several reasons. He believed that Blackfoot would present a better long-term profit potential than the other facility. He thought Blackfoot would be a more complicated station to run, and would have a broader coverage area. He also felt Blackfoot would be a nice place to live.

37. The record further demonstrates that Bott took numerous steps to prepare to move to Blackfoot and to construct and operate the station. Beginning as early as September 1987, Bott visited Blackfoot to acquaint himself with the community. He looked into housing and studio space, visited his tower site, met with community leaders, met with the site manager, obtained literature on the city, and familiarized himself with the community's needs. After his award of the Blackfoot CP became final in March 1991, Bott determined the format § of his proposed station, a process which lasted through the summer of 1991. In this regard, there is no record evidence that the format decision was made prior to the summer of 1991, or that Bott's testimony in the Blackfoot comparative proceeding was untruthful.

38. Next, Bott retained a consulting engineer to prepare a radiofrequency radiation hazard statement which was submitted to the Commission in October 1991. In January 1992, after the Commission issued the CP, Bott took additional action. He sought and received FCC authorization to use the call sign "KCVI." He contacted the site agent to obtain a site management plan in order to assure himself that his tower plans were consistent with the management plan. He had discussions with the president of the transmitter site users group to see if a more advantageous site was available. He conferred with his engineer and an equipment supplier to determine whether to side mount his antenna or use a combiner. He contacted Kent Frandsen, the tower owner, to make arrangements for the installation of his antenna.

39. It is highly significant, and an indication of his good faith, that the steps outlined in the preceding paragraph were taken by Bott *after* he became aware in September 1991 of KRSS's plans to go on the air with the same format he had decided to use and an increase in power from a mountaintop site. Bott was very distressed by this knowledge. He did not believe that two similarly formatted stations would be viable in the market both stations would serve. He also did not believe that he would be financially successful using an alternative format. Nevertheless, Bott continued with his plans to build the station, as described above, hoping that the economy would improve so as to make an alternative format viable, or that the KRSS power

increase proposal would not be implemented. Indeed, Bott initially rejected the suggestion that he sell his CP. It was only after Bott became convinced that his proposed Blackfoot station was no longer an economically viable business venture, and after securing his counsel's advice, that he agreed to the sale.

40. The *HDO*, at paragraph 10, posed the question of why, if Bott intended to proceed without having chosen a particular format, the format issue became so critical later. Bott has satisfactorily answered that question. Specifically, Bott chose the commercial religious format largely because of the depressed state of the economy and the downturn in the radio industry. This format relied primarily upon the sale of blocks of time and, for that reason, stood a greater chance of being economically viable in a depressed economy. The alternative formats he considered relied substantially upon spot advertising. In addition, after Bott became aware of KRSS's plans, he considered format alternatives but, faced with a start-up operation in a very depressed economy, he believed that he would not be financially successful operating a new radio station with a format relying heavily upon spot advertising.

41. The *HDO*, at paragraph 11, also questioned Bott's conclusion that he could not compete with KRSS when Bott's proposed coverage area was greater than that of KRSS. Bott has credibly answered this question as well. Thus, Bott knew, from the time he first learned about KRSS in September 1991, that the station was planning to increase power from a mountaintop site. Based upon his knowledge of broadcast engineering concepts generally, and his prior experience with a mountaintop site, Bott believed that KRSS's signal would serve substantially the same market that he was targeting. (Bott's belief was ultimately shown to be correct.) Moreover, KRSS was in a position to be on the air before Bott's Blackfoot station, and planned to broadcast many of the same programs Bott had intended to use, rendering them unavailable to his station. Even if Bott had sold time to competitive programs, the audience would have been split. Consequently, given the size and demographics of the market, Bott did not believe he could sustain a financially viable operation even with greater coverage.

ULTIMATE CONCLUSION

42. In view of the foregoing, it is ultimately concluded that Richard Bott, II did not misrepresent facts to or lack candor with the Commission, that Richard Bott, II is qualified to remain a Commission permittee, and that the above-captioned assignment application should be granted. In addition, since the record reflects no misrepresentation or lack of candor, it is ultimately concluded that Bott did not willfully or repeatedly violate Section 73.1015 of the Commission's Rules, and the issuance of an order of forfeiture is not warranted.

43. One final matter remains for consideration, namely, the amount of remuneration Bott may receive for the sale of his permit. Section 73.3597(c)(2) of the Rules limits such payment to the legitimate and prudent expenses incurred by Bott in preparing, filing, and advocating the grant of his CP, and for other steps reasonably necessary toward placing the station in operation. In amendments to the assignment application filed on October 14, 1992, and July 23, 1993, Bott has documented legitimate and prudent expenses totalling $91,582.40. Therefore, the payment of that amount to Bott will be authorized. *Eagle 22, Ltd.*, 7 FCC Rcd 5295, 5297 (1992).

Accordingly, IT IS ORDERED that the Motion for Summary decision filed by Bott on December 6, 1993, IS GRANTED, and that Issues (a), (b), and (c) ARE RESOLVED in Bott's favor.

IT IS FURTHER ORDERED that, unless an appeal from this Summary Decision is taken by a party, or it is reviewed by the Commission on its own motion in accordance with Sections 1.251(e) and 1.276 of the Rules, the above-captioned application of Richard Bott, II (assignor) and Western Communications, Inc. (assignee), for assignment of construction permit of Station KCVI(FM), Blackfoot, Idaho, IS GRANTED, and that reimbursement to Bott in the amount of $91,582.40 IS AUTHORIZED.[5]

FEDERAL COMMUNICATIONS COMMISSION

Arthur I. Steinberg
Administrative Law Judge

[5] In the event exceptions are not filed within 30 days after the release of this Summary Decision, and the Commission does not review the case on its own motion, this Summary Decision shall become effective 50 days after its public release pursuant to Sections. 1.251(e) and 1.276(d) of the Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

EMERGENCY PETITION OF THE AMERICAN PUBLIC COMMUNICATIONS COUNCIL FOR A DECLARATORY RULING AND FOR TEMPORARY WAIVER OF SECTION 64.704(C) REQUIREMENTS FOR INDEPENDENT PUBLIC PAYPHONE PROVIDERS OR, IN THE ALTERNATIVE, FOR TEMPORARY SUSPENSION OF SECTION 64.704(C) REQUIREMENTS FOR INDEPENDENT PUBLIC PAYPHONE PROVIDERS

File No. ENF-93-01

ORDER

Adopted: January 21, 1994; Released: January 28, 1994

By the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On February 1, 1993, the American Public Communications Council ("APCC"), on behalf of itself and its members that are served by US West Communications, Inc., filed a petition requesting a declaratory ruling and a temporary waiver or suspension of section 64.704(c) of the Commission's rules, which requires call aggregators to unblock equal access ("10XXX") codes. In its petition, APCC asked the Commission to declare that US West's practice regarding its international direct-dial blocking service was unlawful and inconsistent with its tariff. According to APCC, US West did not allow its customers to subscribe simultaneously to its international direct-dial blocking and other fraud protection services. APCC also requested a temporary waiver or suspension of section 64.704(c) for payphones in US West territory until US West implemented blocking and screening services that are available simultaneously for payphone lines.[1]

2. On December 17, 1993, APCC filed a motion to withdraw its petition. It states that subsequent to the filing of the petition, US West made blocking and screening services available under tariff in accordance with the Commission's requirements.[2] In withdrawing its petition, APCC notes that it "reserves the right to refile for relief from the requirements of section 64.704(c) should US West or any other local exchange carrier fail to provide [international direct-dial] blocking on an unbundled basis with other blocking and screening services or in any other fashion in violation of" the Commission's rules and policies.

3. We are satisfied that granting APCC's motion to withdraw its petition will serve the public interest by eliminating the need for the expenditure of further time and resources of interested parties and of the Commission.

4. Accordingly, IT IS ORDERED, pursuant to section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated in section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that APCC's motion to withdraw its petition IS GRANTED.

5. IT IS FURTHER ORDERED that the above-captioned proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and
Investigations Branch
Enforcement Division
Common Carrier Bureau

[1] *See* Public Notice, DA 93-155, 8 FCC Rcd 959 (1993).
[2] *See* Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation, CC Docket No. 91-35: Order on Reconsideration, 7 FCC Rcd 4355, 4359-62 (1992).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Timothy J. Pugh NAL/Acct. No: 215FE0119
Warrenton, Oregon

ORDER

Adopted: January 24, 1994; Released: January 28, 1994

1. Mr. Timothy J. Pugh has requested review of a forfeiture action. The Forfeiture Order was released August 28, 1992. The forfeiture is mitigated to $50.

2. Mr. Pugh was charged with operation of an unlicensed station on a taxicab frequency from his boat. See 47 U.S.C. §301.

3. Mr. Pugh pleads, essentially, inability to pay the forfeiture. He asserts that his boat was repossessed and that he is unemployed. Considering that Mr. Pugh is an individual and has no history of noncompliance and the financial information provided, it is consistent with the *1993 Policy Statement, Standards for Assessment of Forfeitures*, 8 FCC Rcd 6215 (1993), that the forfeiture amount be reduced to $50.

4. Accordingly, IT IS ORDERED, pursuant to Section 1.80 of the Commission's rules, that Timothy J. Pugh pay a forfeiture of $50 within 30 days of the release of this Order.

5. Forfeiture payments shall be made by check or money order payable to the Federal Communications Commission, NAL/Acct. No.: 215FE0119, and mailed to the following address:

Federal Communications Commission
P.O. Box 73482
Chicago, IL 60673-7482

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

BRYAN INDEPENDENT SCHOOL DISTRICT
Bryan, TX — File No. BPLIF-911219DK

FRANKLIN INDEPENDENT SCHOOL DISTRICT
Bremond, TX — File No. BPLIF-911230DH

For Construction Permit and License
in the Instructional Television
Fixed Service on Channels A1, A2,
A3, and A4

MEMORANDUM OPINION AND ORDER

Adopted: January 11, 1994; Released: January 31, 1994

By the Commission:

1. The Commission has before it for consideration the above-captioned mutually exclusive applications of Bryan Independent School District (Bryan) and Franklin Independent School District (Franklin), each seeking a construction permit and license in the Instructional Television Fixed Service (ITFS) on channels A1-A4 in the areas of Bryan and Bremond, Texas, respectively.

BASIC ELIGIBILITY

2. Before applying the mutually exclusive selection procedure to determine the number of merit points to be awarded to each applicant, we must first ascertain the basic eligibility of the applicants. Educational institutions and governmental organizations that propose to serve either their own enrolled students or students at accredited schools within their respective jurisdictions establish their eligibility by accreditation from the appropriate state department of education or a recognized regional or national accrediting organization. Other ITFS applicants that propose to serve students at accredited schools outside of their respective jurisdictions must, to be eligible, submit letters of intended use from those schools and establish local program committees in those communities. See 47 C.F.R. Section 74.932(a)(1)-(5). Both applicants are qualified to be ITFS licensees. Bryan and Franklin are school districts accredited by the Texas Education Agency. While they propose to serve students outside their districts, they also propose to provide some formal educational programming to schools within their own districts.

MUTUALLY EXCLUSIVE SELECTION PROCEDURE

3. In cases of mutually exclusive ITFS applications, where applicants are competing for the same or adjacent channels in the same geographic area, each application is reviewed pursuant to our comparative process. This procedure awards a maximum of twelve merit points based on five criteria deemed to be most relevant to predicting the applicant best qualified to provide the service for which the ITFS spectrum has been allocated. *Instructional Television Fixed Service - Second Report and Order in MM Docket No. 83-523 (Second Report and Order)*, 101 FCC 2d 49, 65-72 (1985); 47 C.F.R. Section 74.913. First, four points are awarded to local applicants.[1] Second, three points are awarded to applicants which are accredited schools, educational institutions or school boards and school districts applying within their jurisdictions. Third, two points are awarded to applicants whose requests would result in the acquisition by these applicants of four or fewer ITFS channels within the particular area. Fourth, either one or two points may be awarded to applicants for specified levels of proposed ITFS programming.[2] Fifth, one point is awarded to applicants which are existing E or F channel licensees seeking to relocate on another ITFS channel group, where such applicants show an established need for an expanded service that cannot be accommodated on their grandfathered E or F facilities. The tentative selectee is the applicant with the highest score.

4. Under this comparative selection process, the applicants are awarded points based on the following criteria:

Localism. Each applicant is entitled to four points for being local. Each is a school district serving the formal educational needs of schools within its jurisdiction.

Accreditation. Each applicant is entitled to three points for accreditation. Each is accredited by the Texas Education Agency.

Four-Channel Limitation. Neither applicant is the licensee of, or has filed applications for, additional ITFS channels in its proposed service area. Therefore, each applicant is entitled to two points for remaining within the four-channel limitation.

Instructional Programming. ITFS applicants detail their formal educational and other ITFS programming proposals in both a program schedule and a program "grid." Where the amounts and types of programming proposed in the schedule and in the grid are inconsistent, we shall consider as correct, for comparative purposes, the amount and type which result in the least number of points to the applicant, so long as the excess capacity lease permits that level of

[1] A "local" applicant is an institution or organization that is physically located in the community or metropolitan area where service is proposed. *Second Report and Order*, 101 FCC 2d at 59; 47 C.F.R. Section 74.932, Note 1.

[2] One point is awarded for a proposed weekly schedule of at least 21 average hours per channel of formal educational programming or of at least 41 average hours per channel of other ITFS programming. Two points are awarded for a proposed weekly schedule of at least 41 average hours per channel of formal educational programming or at least 61 hours per channel of ITFS programming where at least 21 of those hours are formal educational programming. 47 C.F.R. Section 74.913(b)(4).

programming to be transmitted. See *Hispanic Information and Telecom-munications Network, Inc.*, 7 FCC Rcd 5924 (1992).

Bryan's illustrative schedule proposes an average of 7.5 hours of formal ITFS programming and 10 hours of other ITFS programming per channel per week, while its programming grid proposes averages of 11.25 hours of formal ITFS programming and 17.5 hours of other ITFS programming per channel per week. Because neither the schedule nor the grid establishes the threshold amount at which merit points are awarded, Bryan is entitled to no programming merit points.

The illustrative schedule submitted by Franklin proposes an average of 24.375 hours of ITFS programming per channel per week.[3] However, the schedule does not indicate how many hours are devoted to formal educational programming, as required by Section IV, Question 5 of the application. Accordingly, we will consider this programming as nonformal for the purpose of determining merit points. See *Valley View Independent School District*, 7 FCC Rcd 7228 (1992). In contrast, Franklin's programming grid proposes an average of 4 hours of formal educational programming per channel per week. Because neither the amount of programming specified in Franklin's schedule or in its grid reaches the threshold amount at which merit points are awarded, Franklin is entitled to no programming merit points.

E- and F- Channel Group Relocation. Neither applicant is the current licensee of an E or F channel seeking to relocate to other channels. Consequently, neither is entitled to the one point for such applicants.

Total. Bryan and Franklin are each entitled to four points for being local, three points for being accredited, and two points for observing the four-channel limitation, for a total of nine points each. Because Bryan and Franklin are tied, we must utilize our tie-breaker mechanism to determine the winning applicant.

TIE-BREAKER MECHANISM

5. When the comparative procedure results in a tie among two or more applicants, the parties are given 30 days from notification to negotiate an agreement regarding division of the use of channels. If no agreement is reached and advanced to the Commission within that time, the tentative selectee is determined through the tie-breaker mechanism detailed in *Instructional Television Fixed Service - Third Report and Order in MM Docket No. 83-523, (Third Report and Order)*, 4 FCC Rcd 4830 (1989), *Third Report and Order Reconsidered*, 5 FCC Rcd 945 (1990); and 47 C.F.R. Section 74.913(d). This mechanism is based upon the submission by each applicant of the number of students at its proposed receive sites who are formally enrolled in classes for credit toward an academic degree or diploma or a legally required certification or license.[4] Each applicant then has 15 days to respond to any aspect of the enrollment submissions. Once this response period has expired, the Commission compares the figures to determine if any applicant's system reaches fewer than 80 percent as many students as another applicant's. If so, the application resulting in service to the fewer number of students is denied, and the remaining application is granted. If more than one applicant remains, the channels or channel capacity are evenly divided among the remaining applicants. Because the applicants here did not reach an agreement regarding the use of the channels, we look to the enrollment figures submitted by each.

6. Bryan submitted enrollment figures only for receive sites located within its own jurisdiction. Franklin submitted enrollment figures for receive sites in its respective jurisdiction, as well as for receive sites outside its jurisdiction. However, we cannot count the students from those sites outside its jurisdiction because letters of intended use were not submitted prior to the "B" cut-off date of November 3, 1992. As a result, we will count enrolled students only at schools within each applicant's respective jurisdiction. Accordingly, we credit Bryan with 12,353 students and Franklin with 800 students. Because the number of students credited to Franklin is less than 80 percent of the total number of students credited to Bryan, Franklin's application will be denied and Bryan will be authorized to operate facilities on channels A1-A4.

OTHER MATTERS

7. Bryan proposes to lease excess capacity for non-ITFS use, as permitted by 47 C.F.R. Section 74.931. Bryan has submitted a copy of its lease with Sun World Communications, Inc., which conforms in all respects with our requirements. Finally, there are no petitions to deny the Bryan application.

8. We find Bryan fully qualified to be an ITFS licensee and conclude that grant of Bryan's application would serve the public interest, convenience and necessity.

9. Accordingly, IT IS ORDERED, That the application of Franklin Independent School District (BPLIF-911230DH) IS DENIED, and the application of Bryan Independent School District (BPLIF-911219DK) IS GRANTED subject to the condition that it submit an amendment which contains a complete illustrative schedule within 30 days after the release date of this Order.[5]

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[3] Franklin amended its application, after the "B" cut-off date of November 3, 1992, to "clarify" the information submitted in its initial program grid. If considered, the amendment would upgrade Franklin's comparative position. However, an applicant's comparative position cannot be enhanced by amendments filed after the "B" cut-off date and, therefore, the "clarifying" amendment will not be considered. See *Second Report and Order*, 101 FCC 2d at 74.

[4] Only receive sites specified as of the "B" cut-off date may be used in determining the number of students served. *Third Report and Order Recon., supra*. Moreover, applicants serving students other than their own must have submitted letters, also by the "B" cut-off date, from those receive sites indicating an intention to use the proposed service. 47 C.F.R. Section 74.911(c); *Third Report and Order*, 4 FCC Rcd at 4832. Specifically, those letters, to be signed by the administrator or authority responsible for curriculum planning, must indicate that the applicant's programming offerings have been viewed and that such programming will be incorporated in the sites' curricula. Further, the letters should discuss the types and amounts of programming expected to be used and an indication of the extent to which representatives from the various sites will participate in the planning, scheduling, and production of the programming. 47 C.F.R. Section 74.932, Note 2.

[5] Bryan's program grid reflects programming amounts and types for four channels, but its illustrative schedule only pro-

10. IT IS FURTHER ORDERED, That the staff of the Mass Media Bureau shall send copies of this decision to the applicants by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

vides programming proposals for three channels. It appears that the illustrative schedule data for channel A4 was inadvertently omitted.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

HEARNE INDEPENDENT SCHOOL DISTRICT
Bryan, TX — File No. BPLIF-911219DG

LEON INDEPENDENT SCHOOL DISTRICT,
Bremond, TX — File No. BPLIF-911230DC

For Construction Permit and License
in the Instructional Television
Fixed Service on Channels G1, G2,
G3, and G4

MEMORANDUM OPINION AND ORDER

Adopted: January 11, 1994; Released: January 31, 1994

By the Commission:

1. The Commission has before it for consideration the above-captioned mutually exclusive applications of Hearne Independent School District (Hearne) and Leon Independent School District (Leon), each seeking a construction permit and license in the Instructional Television Fixed Service (ITFS) on channels G1-G4 in the areas of Bryan and Bremond, Texas, respectively.

BASIC ELIGIBILITY

2. Before applying the mutually exclusive selection procedure to determine the number of merit points to be awarded to each applicant, we must first ascertain the basic eligibility of the applicants. Educational institutions and governmental organizations that propose to serve either their own enrolled students or students at accredited schools within their respective jurisdictions establish their eligibility by accreditation from the appropriate state department of education or a recognized regional or national accrediting organization. Other ITFS applicants that propose to serve students at accredited schools outside of their respective jurisdictions must, to be eligible, submit letters of intended use from those schools and establish local program committees in those communities. See 47 C.F.R. Section 74.932(a)(1)-(5). Both applicants are qualified to be ITFS licensees. Hearne and Leon are school districts accredited by the Texas Education Agency. While they propose to serve students outside their districts, they also propose to provide some formal educational programming to schools within their own districts.

MUTUALLY EXCLUSIVE SELECTION PROCEDURE

3. In cases of mutually exclusive ITFS applications, where applicants are competing for the same or adjacent channels in the same geographic area, each application is reviewed pursuant to our comparative process. This procedure awards a maximum of twelve merit points based on five criteria deemed to be most relevant to predicting the applicant best qualified to provide the service for which the ITFS spectrum has been allocated. *Instructional Television Fixed Service - Second Report and Order in MM Docket No. 83-523 (Second Report and Order)*, 101 FCC 2d 49, 65-72 (1985); 47 C.F.R. Section 74.913. First, four points are awarded to local applicants.[1] Second, three points are awarded to applicants which are accredited schools, educational institutions or school boards and school districts applying within their jurisdictions. Third, two points are awarded to applicants whose requests would result in the acquisition by these applicants of four or fewer ITFS channels within the particular area. Fourth, either one or two points may be awarded to applicants for specified levels of proposed ITFS programming.[2] Fifth, one point is awarded to applicants which are existing E or F channel licensees seeking to relocate on another ITFS channel group, where such applicants show an established need for an expanded service that cannot be accommodated on their grandfathered E or F facilities. The tentative selectee is the applicant with the highest score.

4. Under this comparative selection process, the applicants are awarded points based on the following criteria:

Localism. Each applicant is entitled to four points for being local. Each is a school district serving the formal educational needs of schools within its jurisdiction.

Accreditation. Each applicant is entitled to three points for accreditation. Each is accredited by the Texas Education Agency.

Four-Channel Limitation. Neither applicant is the licensee of, or has filed applications for, additional ITFS channels in its proposed service area. Therefore, each applicant is entitled to two points for remaining within the four-channel limitation.

Instructional Programming. ITFS applicants detail their formal educational and other ITFS programming proposals in both a program schedule and a program "grid." Hearne's illustrative schedule and programming grid both propose an average of 41 hours of formal educational programming per channel per week. Thus, Hearne is entitled to two programming merit points. In contrast, Leon's illustrative schedule and programming grid both propose an average of

[1] A "local" applicant is an institution or organization that is physically located in the community or metropolitan area where service is proposed. *Second Report and Order*, 101 FCC 2d at 59; 47 C.F.R. Section 74.932, Note 1.

[2] One point is awarded for a proposed weekly schedule of at least 21 average hours per channel of formal educational programming or of at least 41 average hours per channel of other ITFS programming. Two points are awarded for a proposed weekly schedule of at least 41 average hours per channel of formal educational programming or at least 61 hours per channel of ITFS programming where at least 21 of those hours are formal educational programming. 47 C.F.R. Section 74.913(b)(4).

24.375 hours of formal educational programming per channel per week. Thus, Leon is entitled to one programming merit point.

E- and F- Channel Group Relocation. Neither applicant is the current licensee of an E or F channel seeking to relocate to other channels. Consequently, neither is entitled to the one point for such applicants.

Total. Hearne is entitled to points for being local, for being accredited, for observing the four-channel limitation, and for proposing at least 41 hours of formal educational programming per channel per week, for a total of eleven points. Leon is entitled to points for being local, for being accredited, for observing the four-channel limitation, and for proposing an average of 24.375 hours of formal educational programming per channel per week, for a total of ten points. Thus, Hearne is the selectee.

OTHER MATTERS

5. Hearne proposes to lease excess capacity for non-ITFS use, as permitted by 47 C.F.R. Section 74.931. Hearne has submitted a copy of its lease with Sun World Communications, Inc., which conforms in all respects with our requirements. Finally, there are no petitions to deny the Hearne application.

6. We find Hearne fully qualified to be an ITFS licensee and conclude that grant of Hearne's application would serve the public interest, convenience and necessity.

7. Accordingly, IT IS ORDERED, That the application of Leon Independent School District (BPLIF-911230DC) IS DENIED, and the application of Hearne Independent School District (BPLIF-911219DG) IS GRANTED.

8. IT IS FURTHER ORDERED, That the staff of the Mass Media Bureau shall send copies of this decision to the applicants by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

MOORELAND PUBLIC SCHOOLS
Woodward, OK — File No. BPLIF-920220DB

WOODWARD HOSPITAL AND HEALTH CENTER
Woodward, OK — File No. BPLIF-930219DD

For Construction Permit and License in the Instructional Television Fixed Service on Channels D1, D2, D3, and D4

MEMORANDUM OPINION AND ORDER

Adopted: January 11, 1994; Released: January 31, 1994

By the Commission:

1. The Commission has before it for consideration the above-captioned mutually exclusive applications of Mooreland Public Schools (Mooreland) and Woodward Hospital and Health Center (Hospital) each seeking a construction permit and license in the Instructional Television Fixed Service (ITFS) on channels D1, D2, D3, and D4 in the Woodward, Oklahoma area.

BASIC ELIGIBILITY

2. Before applying the mutually exclusive selection procedure to determine the number of merit points to be awarded to each applicant, we must first ascertain the basic eligibility of the applicants. Both applicants are qualified to be ITFS licensees. Mooreland, accredited by the Oklahoma State Department of Education, is engaged in the formal education of enrolled students within, as well as outside of, its jurisdiction. Hospital is a non-profit organization composed of medical facilities in the Woodward area which it proposes to serve. Hospital is accredited by the Joint Commission of Accreditation of Health Care Organizations. See 47 C.F.R. Section 74.932(a).

MUTUALLY EXCLUSIVE SELECTION PROCEDURE

3. In cases of mutually exclusive applications, where applicants are competing for the same or adjacent channels in the same geographic area, each application is reviewed pursuant to our comparative process. This procedure awards a maximum of 12 merit points based on five criteria deemed to be most relevant in selecting which applicant would be best qualified to provide the service for which the ITFS spectrum has been allocated. *Instructional Television Fixed Service - Second Report and Order in MM Docket No. 83-523 (Second Report and Order)*, 101 FCC 2d 49, 65-72 (1985); 47 C.F.R. Section 74.913. First four points are awarded to local applicants.[1] Second, three points are awarded to applicants which are accredited schools, educational institutions, or school boards and school districts applying within their jurisdictions. Third, two points are awarded to applicants whose requests would result in the acquisition by that applicant of four or fewer ITFS channels within the particular area. Fourth, either one or two points may be awarded to applicants for specified levels of ITFS programming.[2] Fifth, one point is awarded to applicants which are existing Channel E or F licensees seeking to relocate on another ITFS channel group, where such applicants show an established need for an expanded service that cannot be accommodated on their grandfathered E or F facilities. The tentative selectee is the applicant with the highest score.

4. Under this comparative selection process, the applicants are awarded points based on the following criteria:

Localism. Each applicant is entitled to four points for being local. Mooreland is serving the formal educational needs of schools within its jurisdiction. Hospital is providing ITFS service in the area in which its facilities are located.

Accreditation. Mooreland, accredited by the Oklahoma State Department of Education, is entitled to three points for accreditation. With respect to Hospital, the Commission has specifically held that hospitals and medical consortia do not qualify as accredited institutions for the purpose of receiving accreditation points. *Instructional Television Fixed Service - Reconsideration of Second Report and Order in MM Docket No. 83-523*, 59 RR 2d 1355, 1371 (1986). See also, *Milwaukee Regional Medical Instructional Television Station Inc.*, 2 FCC Rcd. 1472, 1473 (1987). Thus, Hospital is not entitled to the three points for accredited applicants.

Four-Channel Limitation. Neither Mooreland nor Hospital is the licensee of, or has filed applications for, additional ITFS channels in the Woodward, Oklahoma area. Consequently, each is entitled to two points for remaining within the four-channel limitation.

Instructional Programming. ITFS applicants detail their formal educational and other ITFS programming proposals in both a program schedule and a programming "grid." Where amounts and types of programming proposed in the schedule and in the grid are inconsistent, we shall consider as correct, for comparative purposes, the amount and type

[1] A "local" applicant generally is an institution or organization that is physically located in the community or metropolitan area where service is proposed. *Second Report and Order*, 101 FCC 2d at 59; 47 C.F.R. Section 74.932, Note 1.

[2] One point is awarded for a proposed weekly schedule of at least 21 average hours per channel of formal educational programming or of at least 41 average hours per channel of other ITFS programming. Two points are awarded for a proposed weekly schedule of at least 41 average hours per channel of formal educational programming or a least 61 hours per channel of ITFS programming where at least 21 of those hours are formal educational programming. 47 C.F.R. Section 74.913(b)(4).

which result in the least number of points to the applicant, so long as the excess capacity lease permits that level of programming to be transmitted. See *Hispanic Information and Telecommunications Network, Inc.*, 7 FCC Rcd. 5924 (1992).

Mooreland's illustrative schedule and grid both propose an average of 20.5 hours of formal educational programming per channel per week. Hospital's illustrative schedule proposes an average of 7.5 hours of formal educational programming per week and 20 hours of other ITFS programming per channel per week, while its programming grid proposes 7.5 hours of formal educational programming per channel per week and 12.5 hours of other ITFS programming per channel per week. Because neither Mooreland nor Hospital has established the threshold amount at which merit points are awarded, neither applicant is entitled to programming merit points.

E- and F- Channel Group Relocation. Neither applicant is the current licensee of an E or F channel seeking to relocate to other channels. Therefore, neither is entitled to the one point for such applicants.

Total. Mooreland is entitled to points for being local, for being accredited, and for observing the four-channel limitation, for a total of nine points. Hospital is entitled to points for being local, and for observing the four-channel limitation, for a total of six points. Thus, Mooreland is the selectee.

OTHER MATTERS

5. Mooreland proposes to lease its excess capacity for non-ITFS use, as permitted by 47 C.F.R. Section 74.931. Mooreland has submitted a copy of its lease with Pioneer Telephone Cooperative, Inc. (Pioneer), but the lease fails to conform entirely to the Commission's requirements. Specifically, if Mooreland and Pioneer are unable to reach agreement on additional renewals, the lease allows Pioneer, at its discretion, to continue to operate on the licensed channels for an additional six-month period. This provision, outlined in Section 1(f) of the lease, is inconsistent with the Commission's requirements for excess capacity leases. See *Instructional Television Fixed Service in Gen. Docket Nos. 90-54, 80-113 - Report and Order*, 5 FCC Rcd. 6410, 6416 (1990). Although inconsistent with our requirements for excess capacity leases, this provision neither reflects on the applicant's basic or comparative qualifications nor precludes grant of an authorization. See *Van Vleck Independent School District*, 7 FCC Rcd. 7231, 7233 (1992). Accordingly, Mooreland's authorization will be conditioned upon conformity of the lease to Commission requirements. Additionally, there are no petitions to deny Mooreland's application.

6. We find Mooreland fully qualified to be an ITFS licensee and conclude that grant of Mooreland's application would serve the public interest, convenience, and necessity.

7. Accordingly, IT IS ORDERED, That the application (BPLIF-930219DD) of Woodward Hospital and Health Center IS DENIED and the application (BPLIF-920220DB) of Mooreland Public Schools IS GRANTED subject to the condition that within 30 days from the release date of this Order, Mooreland Public Schools shall submit to the Chief, Distribution Services Branch, for approval information demonstrating compliance with Commission requirements, including, if appropriate, an amended excess capacity lease conforming to the requirements discussed herein.

8. IT IS FURTHER ORDERED, That the staff of the Mass Media Bureau shall send copies of this decision to the applicants by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of:

PIKE COUNTY BOARD OF EDUCATION
Society Hill, AL — File No. BPLIF-920710DA

AUTAUGA COUNTY PUBLIC SCHOOL SYSTEM
Montgomery, AL — File No. BPLIF-921026DF

For Construction Permit and License
in the Instructional Television
Fixed Service on Channels G1, G2,
G3, and G4

MEMORANDUM OPINION AND ORDER

Adopted: January 11, 1994; Released: January 31, 1994

By the Commission:

1. The Commission has before it for consideration the mutually exclusive applications of Pike County Board of Education (Pike) and Autauga County Public School System (Autauga), each seeking a construction permit and license in the Instructional Television Fixed Service (ITFS) on channels G1-G4 in Society Hill, and Montgomery, Alabama, respectively.

BASIC ELIGIBILITY

2. Before applying the mutually exclusive selection procedure to determine the number of merit points to be awarded to each applicant, we must first ascertain the basic eligibility of Pike and Autauga. Educational institutions and governmental organizations that propose to serve either their own enrolled students or students at accredited schools within their respective jurisdictions establish their eligibility by accreditation from the appropriate state department of education or a recognized regional or national accrediting organization. Other ITFS applicants that propose to serve students at accredited schools outside of their respective jurisdictions must, to be eligible, submit letters of intended use from those schools and establish local program committees in those communities. See 47 C.F.R. Section 74.932(a)(1)-(5). Both applicants are qualified to be ITFS licensees. Pike is a governmental organization engaged in the formal education of enrolled students and is accredited by the Southern Association of Colleges and Schools. Pike proposes to serve students outside of its jurisdiction and has submitted letters from accredited entities stating that they would serve as receive sites and would offer Pike's programming to their students. The letters also indicate that representatives from the schools will serve on a local program committee. See 47 C.F.R. Section 74.932, Notes 2 and 3. Autauga is a government organization engaged in the formal education of enrolled students and proposes to serve students only at those schools within its jurisdiction. Autauga is accredited by the Alabama State Board of Education.

MUTUALLY EXCLUSIVE SELECTION PROCEDURE

3. In cases of mutually exclusive ITFS applications, where applicants are competing for the same or adjacent channels in the same geographic area, each application is reviewed pursuant to our comparative process. This procedure awards a maximum of twelve merit points based on five criteria deemed to be most relevant to predicting the applicant best qualified to provide the service for which the ITFS spectrum has been allocated. *Instructional Television Fixed Service - Second Report and Order in MM Docket No. 83-523 (Second Report and Order)*, 101 FCC 2d 49, 65-72 (1985); 47 C.F.R. Section 74.913. First, four points are awarded to local applicants.[1] Second, three points are awarded to applicants which are accredited schools, educational institutions or school boards and school districts applying within their jurisdictions. Third, two points are awarded to applicants whose request would result in the acquisition by these applicants of four or fewer ITFS channels within the particular area. Fourth, either one or two points may be awarded to applicants for specified levels of proposed ITFS programming.[2] Fifth, one point is awarded to applicants which are existing E or F channel licensees seeking to relocate on another ITFS channel group, where such applicants show an established need for an expanded service that cannot be accommodated on their grandfathered E or F facilities. The tentative selectee is the applicant with the highest score.

4. Under this comparative selection process, the applicants are awarded points based on the following criteria:

Localism. Pike proposes to serve the formal educational needs of schools in Macon County, Alabama, which is outside of its jurisdiction. Therefore, Pike is not entitled to points for being a local applicant. See *Argonia Unified School District #359*, 8 FCC Rcd. 4286 (1993). Autauga proposes to serve the formal educational needs of schools within its jurisdiction. Therefore, Autauga is entitled to four points for being local.

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[1] A "local" applicant is an institution or organization that is physically located in the community or metropolitan area where service is proposed. *Second Report and Order*, 101 FCC 2d at 59; 47 C.F.R. Section 74.932, Note 1.

[2] One point is awarded for a proposed weekly schedule of at least 21 average hours per channel of formal educational programming or of at least 41 average hours per channel of other ITFS programming. Two points are awarded for a proposed weekly schedule of at least 41 average hours per channel of formal educational programming or at least 61 hours per channel of ITFS programming where at least 21 hours of those hours are formal educational programming. 47 C.F.R. Section 74.913(b)(4).

Accreditation. Pike, although accredited by the Southern Association of Colleges and Schools, is not applying within its jurisdiction and, therefore, is not entitled to points for accreditation. *Id.* at 4287. Autauga, accredited by the Alabama State Board of Education, is entitled to three points for accreditation.

Four-Channel Limitation. Neither of the applicants is the licensee of, or has filed applications for, additional ITFS channels in the area which it is proposing to serve. Therefore, Pike and Autauga are each entitled to two points for remaining within the four-channel limitation.

Instructional Programming. ITFS applicants detail their formal educational and other ITFS programming proposals in both a program schedule and a program "grid". Pike's illustrative schedule and programming grid both propose an average of 24.375 hours of formal educational programming per channel per week. Autauga's illustrative schedule and programming grid both propose an average of 21 hours of formal educational ITFS programming per channel per week. Therefore, Pike and Autauga are each entitled to one programming merit point.

E- and F- Channel Group Relocations. Neither applicant is the current licensee of an E or F channel seeking to relocate to other channels. Therefore, Pike and Autauga are not entitled to the one point for such applicants.

Total. Pike is entitled to points for observing the four-channel limitation and for proposing at least 21 hours of formal educational programming, for a total of 3 points. Autauga is entitled to points for being local, for being accredited, for observing the four-channel limitation, and for proposing at least 21 hours of formal educational programming, for a total of 10 points. Thus the selectee is Autauga.

OTHERS MATTERS

5. Autauga proposes to lease its excess capacity for non-ITFS use, as permitted by 47 C.F.R. Section 74.931, and has submitted a copy of its lease agreement with Capital Cable Television, Inc., a proposed wireless cable system operator. The agreement accords in all respects with our requirements. Finally, there are no petitions to deny Autauga's application.

6. We find Autauga fully qualified to be an ITFS licensee and conclude that a grant of Autauga's application would serve the public interest, convenience, and necessity.

7. Accordingly, IT IS ORDERED, That the application of Pike County Board of Education (BPLIF-920710DA) IS DENIED and the application of Autauga County Public School System (BPLIF-921026DF) IS GRANTED.

8. IT IS FURTHER ORDERED, That the staff of the Mass Media Bureau shall send copies of this decision to the applicants by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CHARTER NETWORK COMPANY,
Complainant,

v.

UNITED TELEPHONE COMPANY OF OHIO, and — File No. E-92-109
UNITED TELEPHONE COMPANY OF INDIANA, INC., — File No. E-92-110
Defendants,

and

In the Matter of

LITEL TELECOMMUNICATIONS CORPORATION d/b/a LCI INTERNATIONAL
Complainant,

v.

UNITED TELEPHONE COMPANY OF INDIANA, and — File No. E-92-116
UNITED TELEPHONE COMPANY OF OHIO, INC., — File No. E-92-118
Defendants.

ORDER

Adopted: January 21, 1994; Released: January 31, 1994

By the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On September 30, 1992, Charter Network Company and Litel Telecommunications Corporation d/b/a LCI International (LCI)[1] filed the above-captioned complaints against United Telephone Company of Ohio and United Telephone Company of Indiana (jointly "United") seeking damages resulting from United's alleged violations of the Commission's rate of return prescription for the period January 1, 1989 through December 31, 1990. On January 12, 1994, however, LCI and United filed joint motions to dismiss the complaints with prejudice stating that mutually agreeable settlements of all pending controversies have been reached.

2. We are satisfied that granting the parties' motions to dismiss the complaints will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of the Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated in Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the parties' Joint Motions to Dismiss ARE GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaints ARE DISMISSED WITH PREJUDICE and the proceedings ARE TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and
Investigations Branch
Enforcement Division
Common Carrier Bureau

[1] LCI is the successor in interest to Charter Network Company.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ALLNET COMMUNICATION
SERVICES, INC.,
Complainant,

v.

CENTRAL TELEPHONE COMPANY OF NEVADA, File No. E-93-031
THE UNITED TELEPHONE COMPANY OF FLORIDA, File No. E-93-032
THE UNITED TELEPHONE COMPANY OF OHIO,
THE UNITED TELEPHONE COMPANY OF PENNSYLVANIA, and
CAROLINA TELEPHONE & TELEGRAPH COMPANY,
Defendants.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and
Investigations Branch
Enforcement Division
Common Carrier Bureau

ORDER

Adopted: January 21, 1994; Released: January 31, 1994

By the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On December 31, 1992, Allnet Communication Services, Inc. (Allnet) filed the above-captioned complaints against defendants seeking damages resulting from the defendants' alleged violations of the Commission's rate of return prescription for the period January 1, 1989 through December 31, 1990. On January 12, 1994, however, Allnet and the defendants filed joint motions to dismiss the complaints with prejudice stating that mutually agreeable settlements of all pending controversies have been reached.

2. We are satisfied that granting the parties' motions to dismiss the complaints will serve the public interest by h) eliminating the need for further litigation and the expenditure of further time and resources of the parties and of the Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated in Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the parties' Joint Motions to Dismiss ARE GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaints ARE DISMISSED WITH PREJUDICE and the proceedings ARE TERMINATED.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-125

In re Applications of

BENNETT GILBERT GAINES, INTERLOCUTORY RECEIVER FOR MAGIC 680, INC.
File No. BR-880830UA

For Renewal of License for
Station WCBM(AM),
Baltimore, Maryland

BENNETT GILBERT GAINES INTERLOCUTORY RECEIVER FOR MAGIC 680, INC.
(Assignor)
File No. BAL-881117EB

and

WCBM MARYLAND, INC.
(Assignee)

For Consent to the Assignment
of License of Station WCBM(AM)
Baltimore, Maryland

MOUNT VERNON BROADCASTING
Baltimore, Maryland
File No. BP-880901AD

For a Construction Permit
for a New AM Station on 680
kHz at Baltimore, Maryland

MEMORANDUM OPINION AND ORDER

Adopted: January 24, 1994; Released: January 31, 1994

By the Commission:

1. Under consideration is an Application for Review filed July 12, 1993, by Mount Vernon Broadcasting, asking the Commission to overturn a Review Board Decision, *Bennett Gilbert Gaines, Interlocutory Receiver for Magic 680, Inc.*, 8 FCC Rcd 1405, reconsideration denied, 8 FCC Rcd 3986 (Rev. Bd. 1993). The Board granted applications filed by Bennett Gilbert Gaines for renewal of the license for AM Station WCBM, 680 kHz, Baltimore, Md. and for assignment of the license to WCBM Maryland, Inc. (WCBM Maryland).[1] On our own motion, we are remanding this proceeding for further hearings with respect to the candor of WCBM Maryland's principal, Nicholas B. Mangione. In all other respects the decision of the Review Board is affirmed and Mount Vernon's Application for Review will be denied.

2. Mount Vernon asserts that in order to validate WCBM Maryland's integration proposal, Mangione testified that he was already spending between 32 and 60 hours per week "at the station." Application for Review p. 6. It contends that Mangione's testimony was contradicted by the testimony of two former station employees, who stated that they saw Mangione at the station no more than once a week and that he averaged less than 30 hours a week at WCBM. Mount Vernon Rebuttal Exhibits 1 and 2. Asserting that the ALJ failed to make demeanor findings, Mount Vernon urges the Commission to make its own adverse findings with respect to Mangione's candor, and to deny Gains' application.

3. It is well settled that applicants may properly be disqualified for lying in sworn testimony in the absence of previous formal notification that findings would be made as to whether the testimony was deceitful. See *RKO General, Inc. v. FCC*, 670 F.2d 215, 235 (D.C. Cir. 1981), and *Richardson Broadcasting Group*, 7 FCC Rcd 1583 (1992), affirmed *sub nom. Elizabeth M. Younts v. FCC*, Case No. 92-119 (D.C. Cir. May 10, 1993). *RKO* holds that such action may be warranted provided that: (a) the misconduct before the agency is so blatant that its existence cannot be denied; (b) the disqualified party had some form of prior actual notice and was not prejudiced by surprise; and (c) the disqualified party was afforded an opportunity to defend against the charge. The question here is whether Mount Vernon has demonstrated that such an adverse determination is warranted on the basis of the record in this proceeding.[2]

4. In this regard, Mount Vernon points out that when Mangione was cross-examined about how many hours he devotes to the station, the following exchange took place:

> Q. And since you have been there -- since you have been manager -- I think we have stated that you spend from 40, sometimes 50, sometimes 60 -- 35 hours, 36 hours, 32 hours a week.
>
> A. It varies.
>
> Q. It varies? And is it your intention to continue the same pattern if you get the license?
>
> A. No sir. It's my intentions of working minimum of 40 hours a week at the station. [sic] . . . Tr. 619-20.

[1] Also before the Commission is a Joint Opposition to Application for Review filed on July 27, 1993 and a Supplement filed August 11, 1993 by Gaines and WCBM Maryland and an Opposition to Application for Review filed July 23, 1993 by the Mass Media Bureau.

[2] Although Mount Vernon claimed in its Exceptions and Supporting Brief filed April 27, 1992, that Mangione lacked candor in his testimony, its argument was in a section of the brief concerning WCBM Maryland's integration credit, which the Board chose not to address in light of its disqualification of Mount Vernon.

Mount Vernon also observes that, during the rebuttal phase of the proceeding, Myron Laufer, a former employee of WCBM, testified that during his 11 month tenure as General Manager of WCBM he saw Mangione fewer than 10 times, that Mangione attended only one meeting at the station, that for one period he did not see Mangione for 2 or 3 months, and that Mangione did not average 30 hours per week at WCBM during the period that Laufer was General Manager. Mount Vernon Rebuttal Exh. 1 at p. 4. Bernard McCain, another former employee, testified that, although he worked at WCBM from October 1988 to March 1990, he never saw Mangione at the station more than once a week and that there were longer periods than a week when he never saw Mangione at the station. Mount Vernon Rebuttal Exh. 2 at p. 3.

5. Contrary to Mount Vernon's contention, the hearing record is insufficient to establish that Mangione was lacking in candor concerning the amount of time that he spent "at the station." Although Mount Vernon had a full opportunity during the hearing to examine Mangione in connection with his integration proposal about the number of hours he was physically at the station, it never elicited testimony from Mangione to show how often he was on the premises of WCBM or for how long a duration. It merely elicited a response that his time "varies." In view of other evidence that Mangione generally supervised the operation of the station and that he discussed station business with Laufer on the telephone, Mount Vernon Rebuttal Exh. 1 at p.3, it is apparent that Mangione devoted substantial time to his management responsibilities for WCBM. Thus, Mangione's hearing testimony that his time spent on WCBM "varies" is not so clearly inconsistent with the former employees' testimony as to warrant a finding that Mangione was lacking in candor in his hearing testimony concerning his involvement in the operations of WCBM.

6. Notwithstanding our rejection of Mount Vernon's contention based on the hearing record, there is further information before us bearing on Mangione's candor which should be considered before this proceeding is finally resolved. After the hearing record was closed, Mount Vernon filed a Petition to Enlarge Issues against WCBM Maryland,[3] attaching portions of Mangione's Deposition taken on October 12, 1990.[4] In his Deposition, Mangione represented while under oath that he had spent between 30 and 60 hours a week "physically" at the station. Deposition at 107. He further indicated that he was spending time at WCBM because he likes "to be around the people out there, so [he] . . . can learn the business . . . ." Deposition at 66.

7. Although it is clear that unnecessary delay in the resolution of adjudicatory proceedings should be avoided, we believe that the apparent discrepancy between the representations that Mangione gave in his Deposition and the sworn testimony of the former employees raises such a serious issue that the public interest obliges us to reopen this record for further proceedings concerning the candor of Mangione's Deposition.[5] Mangione was never confronted with or given an opportunity to explain or otherwise address the representations made in his Deposition. Therefore, we will on our own motion enlarge the issues and remand this proceeding for further expedited hearings to make an appropriate public interest determination with respect to Mangione's candor. See *Frank Digesu, supra.*

8. ACCORDINGLY IT IS ORDERED, That the Application Review filed July 12, 1993, by Mount Vernon Broadcasting IS DENIED.

9. IT IS FURTHER ORDERED, That pursuant to 47 U.S.C. § 309(e)and on our own motion, this proceeding IS REMANDED to Administrative Law Judge John M. Frysiak for expedited hearing and preparation of a Supplemental Initial Decision on the following issues:[6]

1. To determine whether Nicholas B. Mangione made material misrepresentations with respect to his involvement in the management of WCBM and the proposed management of WCBM Maryland, Inc.

2. To determine from the evidence adduced pursuant to Issue 1 above, whether WCBM Maryland, Inc. possesses the basic qualifications to be the licensee of the facilities sought herein.

10. IT IS FURTHER ORDERED, That the burden of going forward with the evidence under Issue 1 SHALL BE UPON Mount Vernon Broadcasting and that the burden of proof under Issue 2 SHALL BE UPON Bennett Gilbert Gaines and WCBM Maryland, Inc. *Elyria-Lorain Broadcasting Co.*, 6 RR 2d 191, 198 ¶ 17 (1965).

11. IT IS FURTHER ORDERED, That any exceptions to the Supplemental Initial Decision SHALL BE DIRECTED to the Commission.

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[3] The ALJ denied Mount Vernon's petition. FCC 91M-997, released March 19, 1991. Mount Vernon did not take exception to the ALJ's ruling in its appeal of the Initial Decision, and thus it has waived its right to object to the denial of its petition. See 47 C.F.R. § 1.277(a).

[4] Although Mangione was questioned about the Deposition during the hearing, it was never offered into evidence while he was testifying. Mount Vernon, after reviewing Mangione's testimony tried to have the Deposition entered into evidence during the rebuttal phase of the proceeding. The ALJ properly rejected the Deposition as an exhibit because it would have been prejudicial to consider the Deposition without affording Mangione an opportunity to testify and validate or explain the statements in his Deposition. Tr. 1289-92.

[5] When there are conflicting sworn statements raising substantial and material questions of fact, and the record is inadequate to permit a reasoned resolution of the conflict, a proceeding must be remanded for further hearings. *David Ortiz Radio Corporation v. FCC*, 941 F.2d 1253, 1260-61 (D.C. Cir. 1992). See also *Frank Digesu, Sr.*, 7 FCC Rcd 5459, 5460 ¶ 15 (1992) (unresolved factual disputes leave a substantial question as to whether intentional deception took place).

[6] The ALJ is directed, consistent with the efficient and orderly resolution of the cases pending before him, to expedite his consideration of the further hearings pursuant to the procedures set forth in the *Hearing Reform Report and Order*, 6 FCC Rcd 157 (1990), *consideration granted in part*, 6 FCC Rcd 3403 (1991). In this regard, we direct the parties to file motions concerning discovery procedures within 10 days from the release date of this Memorandum Opinion and Order. Finally, absent good cause, any such discovery shall be completed within 30 days of the ALJ's actions on such motions. *See Hearing Reform*, 6 FCC Rcd at 161 ¶30 ; 47 C.F.R. § 1.229(e).

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

ET Docket No. 93-28

In the Matter of

Amendment of Section 2.106 of the Commission's Rules to Allocate the 1610-1626.5 MHz and the 2483.5-2500 MHz Bands for Use by the Mobile-Satellite Service, Including Non-geostationary Satellites	RM-7771, RM-7773 RM-7805, RM-7806 RM-7927

REPORT AND ORDER

Adopted: December 13, 1993; Released: January 12, 1994

By the Commission:

TABLE OF CONTENTS

Topic	Paragraph No.
INTRODUCTION	1
BACKGROUND	2-9
DISCUSSION	
Allocation of Spectrum	10-18
Bi-directional Operations	19-22
Power-related Limits and Coordination Requirements	23-26
Feeder Links	27-30
Inter-Satellite Links	31
RF Radiation Limits	32-35
OTHER MATTERS	36-37
ORDERING CLAUSES	38-39
APPENDICES	
A. Final Regulatory Analysis	
B. Rule Changes	

INTRODUCTION

1. By this *Report and Order*, the Commission is allocating 33 megahertz of spectrum, 1610-1626.5 and 2483.5-2500 MHz, for the mobile-satellite service (MSS). This allocation is identical to that adopted internationally by the 1992 World Administrative Radio Conference (WARC-92). This new spectrum will support the growing demand for mobile communications, both domestically and internationally. This allocation will permit the introduction of new mobile satellite services, including voice, facsimile, and data applications, and facilitate the availability of such services on a worldwide basis. The MSS services expected to use this spectrum include cellular telephone-like services, personal locator services, data messaging, inventory control, and fleet monitoring. In addition, this MSS spectrum may be used to offer important public safety applications by extending mobile communications capability to rural and remote areas for the first time. Internationally, global MSS applications have the potential to make modern telephone type communications services available for the first time to many underserved areas of the world.

BACKGROUND

2. The bands proposed for MSS, 1610-1626.5 and 2483.5-2500 MHz, currently are allocated to a number of other services. The radiodetermination satellite service (RDSS), which encompasses both radionavigation and radiolocation satellite services,[1] are allocated the bands on a primary basis but only interim RDSS systems have been authorized.[2] The 1610-1626.5 MHz band is allocated to the aeronautical radionavigation service on a co-primary basis, and the 1610.6-1613.8 MHz segment of this band also is allocated to the radio astronomy service (RAS) on a secondary basis. Frequencies adjacent to the 1610-1626.5 MHz band are allocated to aeronautical radionavigation satellite and maritime mobile satellite services.

3. The 2483.5-2500 MHz band is authorized for co-primary use by the broadcast auxiliary service, the terrestrial fixed service, and the industrial, scientific and medical (ISM) service. Additionally, the frequencies adjacent to this band are allocated to the instructional television fixed service (ITFS), the multi-channel multi-point distribution service (MMDS), fixed services, mobile services and the ISM service on a primary basis; and to the radiolocation service on a secondary basis.

4. Five parties filed Petitions for Rule Making seeking to operate LEO MSS systems on all, or portions of, the RDSS bands.[3] The parties requesting allocation of this spectrum for LEO use are Ellipsat Corporation (Ellipsat), Loral/Qualcomm Satellite Services, Inc. (Loral), TRW, Inc. (TRW), Constellation Communications, Inc. (Constellation) and Motorola Satellite Communications, Inc. (Motorola). These parties propose to provide a variety of services, including position determination and reporting; telephone,

[1] *See* Table of Frequency Allocations, 47 C.F.R. § 2.106. The 1610-1626.5 and 2483.5-2500 MHz bands currently are allocated for RDSS Earth-to-space and space-to-Earth transmissions, respectively.

[2] No dedicated RDSS space stations are operating. We have authorized interim RDSS operations to Newcomb Communications, Inc., and Mobile Data Communications, Inc., in the 1610-1626.5 MHz band using the GTE Spacenet fixed-satellite system. Those authorizations require the licensee to terminate transmissions when an MSS "Above 1 GHz" system is launched and is ready to begin operations. *See* Newcomb Communications, Inc., 8 FCC Rcd 3631 (1993); letter to Counsel, Mobile Data Communications, Inc. from Chief, Domestic Facilities Division (August 19, 1993).

[3] These Petitions for Rule Making were associated with applications to construct LEO satellites.

data and facsimile transmission; and fleet surveillance and control for the transportation and public service communities.

5. According to the petitioners, LEO satellite operations could provide these services in areas where such services are not practical using conventional terrestrial or geostationary satellite communications systems. The parties argue that providing services by using LEOs will be less costly than using GEO satellites and that these services can be provided worldwide using a single LEO system. A variety of satellite system designs was proposed by the five LEO proponents. They range from Ellipsat's six satellite/single orbit system to Motorola's 66 satellite/six orbit system. The proposed LEO systems also vary in the access method to be used: Ellipsat, Loral and TRW propose code division multiple access (CDMA) digital spread spectrum technology; Constellation proposes both CDMA and frequency division multiple access (FDMA); and Motorola proposes FDMA and time division multiple access (TDMA) techniques.

6. Two additional Petitions for Rule Making were filed, one by the American Mobile Satellite Corporation (AMSC) and one by CELSAT, Inc. (CELSAT). Both of these petitioners request that the bands be allocated for GEO MSS use. AMSC, the U.S. domestic MSS licensee in the 1545-1559 and 1646.5-1660.5 MHz bands, requests that the Commission allocate for GEO MSS the 1616-1626.5 MHz band with the 1515-1525 MHz band and assign these frequencies to AMSC.[4] AMSC stated that it needs these bands to expand its planned MSS system because of problems in coordinating internationally its currently assigned channels. CELSAT requests that both the 1610-1626.5 and 2483.5-2500 MHz bands be allocated for a new hybrid satellite and terrestrial personal communications service. CELSAT's proposed service would combine mobile-satellite service provided through a satellite in geostationary orbit with new terrestrial cellular-like service operating in this same spectrum to create a system of overlapping space and ground cells.

7. In February 1992, based upon a U.S. proposal,[5] WARC-92 established a co-primary allocation for MSS at 1610-1626.5 and 2483.5-2500 MHz.[6] This allocation permits the operation of high speed data and voice MSS on these frequencies. WARC-92 also upgraded to co-primary status the secondary allocation for the RAS at 1610.6-1613.8 MHz.

8. In response to these petitions and to the decisions of WARC-92, in the *Notice of Proposed Rule Making and Tentative Decision* (*Notice*) we proposed to allocate the 1610-1626.5 and 2483.5-2500 MHz bands to the mobile-satellite service, including both LEO and GEO MSS systems.[7] The 1610-1626.5 MHz band was proposed for Earth-to-space operations, and the 2483.5-2500 MHz band for space-to-Earth operations. We also proposed to allow space-to-Earth operations in the 1613.8-1626.5 MHz band on a secondary basis to accommodate bi-directional MSS operations. Further, in the 1610.6-1613.8 MHz band we proposed to elevate the existing secondary allocation for the radio astronomy service to co-primary status as adopted internationally at WARC-92. We also proposed to require that MSS operations comply with the power-related limits contained in the international Radio Regulations. In addition, we declined to propose specific new allocations for MSS feeder links, stating that the current fixed satellite bands should be sufficient for such use.[8] Finally, we proposed allocations in the 24 and 28 GHz bands for the inter-satellite service to accommodate inter-satellite links for MSS systems.[9]

9. In December 1992, we established the MSS Above 1 GHz Negotiated Rule Making Committee (MSS NRMC) to provide expert advice and to make recommendations on technical and operational matters related to establishing MSS in the RDSS bands.[10] The Committee's sixteen members included all seven MSS applicants, other users of the RDSS and adjacent bands, and a potential equipment manufacturer.[11] The Committee's work included technical matters relating to compatibility among the proposed MSS systems (intra-system sharing issues), compatibility between MSS and other services in the RDSS or adjacent bands (inter-service sharing issues) and operations of MSS feeder and inter-satellite links. The MSS NRMC reached a consensus with regard to many of these issues and published proposals for rules and policies in its "Report to the Commission" (MSS NRMC Report).[12] The Committee did not succeed in efforts to develop an inter-system sharing proposal that would allow all of the proposed MSS systems to

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[4] The Commission did not propose to allocate the 1515-1525 MHz band in the *Notice of Proposed Rule Making* because of the current use of the band by the aeronautical telemetering community.

[5] *See United States Delegation Report*, World Administrative Radio Conference, International Telecommunication Union, Malaga-Torremolinos, Department of State Publication 9988 (July 1992).

[6] *See* International Telecommunications Union, *Final Acts of the 1992 World Administrative Radio Conference* (*Final Acts*), Malaga-Torremolinos (1992).

[7] *See Notice of Proposed Rule Making and Tentative Decision*, ET Docket No. 92-28, 7 FCC Rcd 6414 (1992).

[8] "Feeder links" are transmission links between a fixed Earth station and a satellite. MSS feeder links include both uplinks and downlinks.

[9] "Inter-satellite links" are transmission links directly between satellites, with no intervening Earth station.

[10] The MSS NRMC was established as an advisory committee to assist with our Negotiated Rule Making proceeding in CC Docket No. 92-166 addressing the applications to construct satellites for operation of MSS services in the RDSS bands. This committee was established pursuant to the Federal Advisory Committee Act, 5 U.S.C. App. 1, and the Negotiated Rule Making Act of 1990 (NRA), 5 U.S.C. §§ 581, *et seq.*, Pub. L. No. 101-648. *See* Public Notice, Report No. DS-1265, 7 FCC Rcd 8614 (1992). The Committee first met on January 6, 1993, and issued its Report at its conclusion on April 6, 1993, *see infra* note 12.

[11] The MSS NRMC members included representatives from AMSC, CELSAT, Ellipsat, Motorola, Constellation, TRW, Loral Qualcomm, the Federal Aviation Administration (FAA), the National Academy of Sciences - National Research Council's Committee on Radio Frequencies (CORF), the National Aeronautics and Space Administration (NASA), the Wireless Cable Association International, Inc., Rockwell International Corporation, the Communications Satellite Corporation (Comsat), the U.S. Army and Aeronautical Radio, Inc. (ARINC).

[12] "Report of the MSS Above 1 GHz Negotiated Rule Making Committee," April 6, 1993, CC Docket No. 92-166. The NRA defines "consensus" as unanimous concurrence among the interests represented on the Committee, although it permits the Committee to agree on another specified definition.5 U.S.C. § 562(2). The Committee defined consensus as unanimous concurrence, but agreed that if unanimity could not be reached the situation would be described in the Committee Report.

be accommodated in the 33 megahertz of spectrum proposed to be allocated. Instead, two independent attachments were included in the Committee Report that address inter-system sharing issues.[13]

DISCUSSION

10. *Allocation of Spectrum.* In the *Notice* we observed that there appears to be substantial interest in using the 1610-1626.5 and 2483.5-2500 MHz bands for MSS applications. We noted that the services to be provided by the proposed MSS LEO systems appear to offer significant new benefits to both domestic and international communications users. In this regard, we observed that MSS LEO systems offer the flexibility of a universally available worldwide cellular-like telephone service for voice and data communications in addition to radiolocation and navigation service. We also recognized that there is interest in using these bands for MSS GEO operations. We tentatively concluded that, because of the important economic and service innovations that could be provided by both MSS LEO and MSS GEO systems, it is important to provide an opportunity for these services to develop.[14] We further noted that allocation of these bands for MSS would be identical to the international allocation at these frequencies for MSS established at WARC-92. We therefore proposed to establish new primary allocations at 1610-1626.5 and 2483.5-2500 MHz for mobile satellite services. We stated that allocating these bands to MSS would provide the maximum flexibility in considering the several MSS petitions before us by permitting operation of both LEO and GEO MSS operations. We also tentatively concluded that the public interest would be served best by providing for multiple MSS operators.

11. In the *Notice* we also recognized significant concerns about the feasibility of MSS LEO and MSS GEO operations sharing the same frequencies. In particular, we noted that sharing these bands by LEO and GEO systems may require limits on power and frequency that could render both types of systems unworkable. We requested information on this issue to enable us to evaluate the relative merits of the CDMA spread spectrum, TDMA and FDMA access schemes proposed by the MSS proponents and to determine whether it is feasible to permit both CDMA and a combined TDMA/FDMA system to share the same spectrum. We also requested comment on these access methods to the extent that they might affect the allocation of the subject spectrum and competition among systems using this spectrum.[15]

12. The commenting parties generally support our proposal to allocate the 1610-1626.5 and 2483.5-2500 MHz bands for MSS use. For example, the American Petroleum Institute (API) states that this spectrum is needed to meet a growing demand for mobile voice, facsimile, data messaging, and fleet surveillance and control services. Motorola states that allocating this spectrum as proposed will help meet the increasing demand for MSS services, implement decisions made at WARC-92, and significantly advance the efficient and effective use of this spectrum by increasing the types of services that can be provided to include voice and data messaging as well as the position determination type services for which the spectrum currently is allocated. Motorola further states that allocating spectrum for provision of these services will foster U.S. competitiveness and help maintain the U.S. lead with regard to non-geostationary MSS technology. Motorola submits that the proposed allocations also will foster communications technologies that enhance the safety of life and property by permitting the operation of personal locator services that can be used in emergency situations such as for search and rescue of lost hikers and campers.

13. The MSS proponents state that they intend to provide both MSS and RDSS services. TRW, for example, states that it anticipates that RDSS applications will be a significant percentage of its user volume. TRW explains that it expects to provide tracking services to businesses needing to track inventory and to freight carriers needing to monitor items in transit. TRW further states that it expects organizations that must maintain constant communication with personnel, such as municipal, local, and state governments providing emergency services related to citizen safety, to take advantage of this new mobile service. TRW further contends that cellular service providers interested in augmenting and expanding the coverage areas of their systems or filling gaps in coverage may utilize these services to meet such requirements. TRW concludes that there is a significant untapped demand for satellite systems providing ubiquitous global telecommunications service to hand-held units such as those envisioned in its proposed system.[16] The LEO proponents generally state that compared to geostationary satellites, the lower power requirements of non-geostationary satellites should result in lower operating costs for the hand-held devices associated with their systems.

14. The GEO proponents state that they plan to provide services similar to those proposed by non-geostationary proponents. CELSAT proposes a personal communications service that would provide mobile service using both satellite and terrestrial stations. AMSC states that it plans to provide services that include voice communications and position determination to the trucking, railroad, and petroleum industries using mobile units.

15. No comments opposed the proposed allocation for MSS. However two parties, AMSC and the National Academy of Sciences through the National Research Council's Committee on Radio Frequencies (CORF), express concern about possible harmful interference from MSS operations to other services with primary allocations in and adjacent to the 1610-1626.5 and 2483.5-2500 MHz bands. These parties are concerned particularly with possible harmful

[13] *See* "Final Report of the Majority of the Active Participants of Informal Working Group 1 to the Above 1 GHz Negotiated Rule Making Committee, Annex 1/Attachment 1 to Committee Report" (Annex 1/Attachment 1) and "Report of Motorola on Band Segmentation Sharing to Working Group 1 of the Above 1 GHz Negotiated Rule Making Committee, Annex 1/Attachment 2 to the Committee Report" (Annex 1/Attachment 2).

[14] We also noted the petitioners' view that the proposed 33 MHz of spectrum may not be sufficient to accommodate all of the MSS applicants at the proposed levels of service.

[15] We stated that we intended to consider in a subsequent proceeding whether it may be necessary to limit operations in this spectrum to a specific type of access method in order to maximize sharing possibilities.

[16] TRW estimates that eventually it will have up to 2 million customers and could establish a viable satellite service with up to two other competing satellite systems in operation.

interference to the radio astronomy and aeronautical radionavigation services, both of which share portions of the 1610-1626.5 MHz band.

16. Both the LEO and GEO proponents acknowledge that using the same spectrum for both geostationary and non-geostationary operations will require substantial limitations on both power and frequency. For this reason, the proponents on both sides argue that we should limit the proposed MSS allocation to either LEO or GEO operation, their preference depending upon the type system they propose. The MSS NRMC considered this issue and concluded that MSS sharing between LEO and GEO systems is possible if both types of systems use the same access techniques and if the sharing is limited to frequencies not used for bi-directional operations.

17. Based on the record in this proceeding, we find that there is substantial interest in using both LEO and GEO technologies to provide new voice and data MSS services in the subject bands. As we indicated in the *Notice*, MSS LEO systems will offer significant new benefits to both domestic and international communications users. MSS LEO systems potentially can provide a universally available worldwide cellular-like radiotelephone service offering voice, data, and facsimile services. In addition, radiolocation and radionavigation applications also can be provided. Some of the new applications envisioned include:

* Personal Locator Services - Such services could be used to locate accident victims or persons stranded because of weather or injury.

* Fleet Management and Tracking Services - Such services would permit more efficient shipping and transportation of goods, including the tracking of hazardous wastes and material.

* Public Safety Services - State and local governments may use MSS to extend health and emergency services to rural and remote areas currently unserved by traditional communications facilities.

* International Services - Global MSS applications have the potential to make modern telephone communications available to the remote and underserved areas of the world.

The low power requirements of MSS LEO space stations and their associated portable ground units that would operate in these bands are expected to result in these new services being available at relatively low cost. Moreover, it appears that recent advances in both satellite and ground transceiver technology will make it possible to provide voice and data services with RDSS services in this spectrum. We conclude that the demand for additional MSS services warrants this spectrum allocation and that the 1610-1626.5 and 2483.5-2500 MHz bands are suitable for supporting the proposed services.

18. Based on the comments, we also conclude that it is possible for LEO and GEO satellite systems to share the available spectrum with each other and with other existing services using the bands if appropriate sharing constraints are applied to MSS operations. Accordingly, we are allocating the 1610-1626.5 and 2483.4-2500 MHz bands for MSS use, including both MSS LEO and MSS GEO operations, on a co-primary basis with the existing primary services in these bands. Consistent with WARC-92, we also are upgrading the radio astronomy service in our domestic Table of Frequency Allocations from secondary to primary service in the 1610.6-1613.8 MHz band.[17]

19. *Bi-directional Operations.* In the *Notice* we proposed a primary MSS allocation for uplink operations in the 1610-1626.5 MHz band and a secondary allocation for downlink operations in the 1613.8-1626.5 MHz sub-band.[18] We expressed concern, however, that bi-directional use might not be feasible because of possible harmful interference to radio astronomy services in the adjacent 1610.6-1613.8 MHz portion of the band and to the GLONASS system that is operating up to 1616 MHz, and might complicate coordination among the proposed systems themselves.

20. As part of its investigation of the inter-service sharing issues, the MSS NRMC analyzed sharing between a secondary MSS downlink operation at 1613.8-1626.5 MHz and both the RAS and the GLONASS radionavigation system. It concluded that RAS operations could be protected using techniques such as limiting power flux density, filtering transmitters, and establishing protection zones. The MSS NRMC also concluded that authorizing bi-directional use in this band and sharing with GLONASS is feasible if the MSS downlink power flux density is limited, although the prospect of compatible co-channel operations in the six megahertz now occupied by and notified to the International Telecommunication Union (ITU) for GLONASS (1610-1616 MHz) will be somewhat limited.[19]

21. The MSS proponents that plan to use CDMA techniques generally object to a secondary downlink allocation in this band, maintaining that a bi-directional spectrum allocation will make frequency coordination extremely difficult. Further, TRW contends that synchronizing its system with a bi-directional system would be extremely difficult. Motorola, however, continues to argue in favor of bi-directional operations in this band.[20] It contends that a secondary bi-directional allocation in the 1616-1626.5 MHz band

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[17] No party opposes this upgrade.

[18] In the *Notice*, we also recognized that WARC-92 upgraded the existing radio astronomy allocation at 1610.6-1613.8 MHz from secondary to primary and therefore proposed to upgrade the radio astronomy service to primary status in our domestic Table of Allocations. We are adopting this proposal to reflect the WARC-92 action.

[19] Some of the CDMA proponents indicate that they can operate in the entire 1610-1616 MHz band without exceeding the power-flux limits established at WARC-92. In fact Loral states that it can coordinate successfully with GLONASS and has submitted an interference analysis to support its claim. Ellipsat also supports the power-flux density limits we have proposed. However, Motorola states that it can operate only above 1616 MHz. The MSS NRMC determined that the ability to share the 1610-1616 MHz segment depends upon whether the aviation community is to rely upon the GLONASS system for aircraft approach and terminal communications, or only while "en-route." The international equivalent isotropically radiated power limits for mobile Earth stations were developed to protect use of GLONASS frequencies in the 1610-1616 MHz band when aircraft are "en-route." The MSS NRMC concluded that use of GLONASS "en-route" applications is feasible. We intend to address this issue further in CC Docket No. 92-166.

[20] Loral has recently notified the Commission that it no longer seeks to use the 1613.8-1626.5 MHz portion of the band for bi-directional service. *See* Loral Comments dated December 4, 1992.

is essential to accommodate its system and that its system design, because of its bi-directional use of the band, is more spectrum efficient.

22. The MSS NRMC did not reach agreement on a proposal for spectrum sharing that would allow all proposed systems to be fully accommodated. Instead, two independent proposals were included in the Committee Report.[21] One report was based upon a CDMA system architecture, with systems operating over the entire available bandwidth; the other was based upon dividing the spectrum into segments, with discrete band segments assigned to CDMA and TDMA/FDMA architectures. Although the specific method for sharing among systems remains to be determined, based on the record we conclude that bi-directional operations in the 1613.8-1626.5 MHz band are feasible, and accordingly provide a secondary allocation for space-to-Earth operations in this band.

23. *Power-related Limits and Coordination Requirements.* WARC-92 addressed permitted signal levels in terms of both equivalent isotropically radiated power (e.i.r.p) and power flux density (PFD) at the Earth's surface produced by transmissions to and from a satellite. Specifically, power-related limits and coordination and notification requirements for MSS and RDSS operations in the 1610-1626.5 and 2483.5-2500 MHz bands were added or modified. In ITU Radio Regulation number 753F (RR753F),[22] WARC-92 specified that the PFD levels of RR2566[23] for the 2483.5-2500 MHz space-to-Earth (downlink) band are to be used as a threshold to determine when coordination is required by space stations of the MSS and RDSS services with respect to terrestrial services. RR731E specifies e.i.r.p limits and coordination requirements for MSS and RDSS Earth-to-space (uplink) operations in the 1610-1626.5 MHz band.[24] In addition, specific coordination and notification procedures are set forth in Resolution 46.[25] In the *Notice*, we proposed to adopt these international requirements.

24. Most commenting parties support our proposals for implementing the international power-related limits and the coordination and notification procedures. These parties agree that these requirements are appropriate measures to permit MSS to operate in the 1610-1626.5 and 2483.5-2500 MHz bands. Ellipsat and TRW, for example, express support for the power-related limits and coordination procedures adopted at WARC-92. Loral and Motorola agree that RR731E should be included in the domestic Table because it prescribes e.i.r.p. limits for these bands. Constellation and CELSAT, on the other hand, argue that the international footnotes adopted at WARC-92 should apply only to international operations and coordination and not to domestic operations. For example, Constellation argues that RR731E and RR753F should not be included in the domestic allocation because they are applicable only to international negotiations. CELSAT suggests that we pursue other options, such as limiting the total PFD in the bands; establishing a minimum PFD utilization per voice circuit per beam; establishing a PFD limit per licensed system; requiring that the PFD limit apply to peak power during any on-period for time-duplexed systems; or establishing a PFD allocation based on a reuse incentive for each licensee. CORF notes that RR733E requires that MSS uplink transmissions in the 1610-1625.5 MHz band not cause harmful interference to radio astronomy operations in the 1610.6-1613.8 MHz band.[26] Further, it states that any rules adopted by the Commission should limit emissions in the 2483.5-2500 MHz band so that spurious emissions do not cause harmful interference to radio astronomy operations in the 4990-5000 MHz band.

25. We find that the power-related limits and coordination requirements adopted at WARC-92 are the most suitable measures to assure compatibility between MSS and RDSS operations and other services. While CELSAT's suggestions might offer innovative approaches in some cases, we observe that the WARC-92 requirements were the result

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[21] *See* Final Report of the Majority of the Active Participants (which was supported by AMSC, CELSAT, Constellation, Ellipsat, Loral and TRW) of Informal Working Group 1 to the Above 1 GHz Negotiated Rulemaking Committee, Annex 1/Attachment 1 to the Committee Report; and Report of Motorola on Band Segmentation Sharing to Working Group 1 to the Above 1 GHz Negotiated Rulemaking Committee, Annex 1/Attachment 2 to the Committee Report.

[22] RR753F states "[t]he use of the band 2483.5-2500 MHz by the mobile-satellite and the radiodetermination-satellite services is subject to the application of the coordination and notification procedures set forth in Resolution 46 (WARC-92). Coordination of space stations of the mobile-satellite and radiodetermination-satellite services with respect to terrestrial services is required only if the power flux-density produced at the Earth's surface exceeds the limits in No. 2566. In respect of assignments operating in this band, the provisions of Section II, paragraph 2.2 of Resolution 46 (WARC-92) shall also be applied to geostationary transmitting space stations with respect to terrestrial stations." RR753F was formerly designated as RR753X.

[23] RR2566 provides that "[t]he power flux-density at the Earth's surface produced by emissions from a space station, including emissions from a reflecting satellite, for all conditions and for all methods of modulation, shall not exceed the following values:

- 152 dB(W/m2) in any 4 kHz band for angles of arrival between 0 and 5 degrees above the horizontal plane;

- 152 + 0.5(-5)dB(W/m2) in any 4 kHz band for angles of arrival (in degrees) between 5 and 25 degrees above the horizontal plane;

- 142 dB(W/m2) in any 4 kHz band for angles of arrival between 25 and 90 degrees above the horizontal plane."

[24] RR731E states "[t]he use of the band 1610-1626.5 MHz by the mobile-satellite service (Earth-to-space) and by the radiodetermination-satellite service (Earth-to-space) is subject to the application of the coordination and notification procedures set forth in Resolution 46 (WARC-92). A mobile earth station operating in either of the services in this band shall not produce an e.i.r.p. density in excess of -15 dB(W/4 kHz) in the part of the band used by systems operating in accordance with the provisions of No. 732, unless otherwise agreed by the affected administrations. In the part of the band where such systems are not operating, a value of -3 dB(W/4 kHz) is applicable. Stations of the mobile-satellite service shall not cause harmful interference to, or claim protection from, stations in the aeronautical radionavigation service, stations operating in accordance with the provisions of No. 732 and stations in the fixed service operating in accordance with the provisions of No. 730." RR731E was formerly designated as RR731X.

[25] Resolution 46 was formerly designated as Resolution COM5/8.

[26] RR733E states "[h]armful interference shall not be caused to stations of the radio astronomy service using the band 1610.6-1613.8 MHz by stations of the radiodetermination-satellite and mobile-satellite services."

of extensive negotiations and technical analyses. RR731E and RR753F were intended to provide the basis for international notification and coordination of the various satellite systems and to assure that existing systems are afforded protection from harmful interference. Compliance with these Radio Regulations will assure MSS providers that they can use these bands and also will facilitate coordination in the international arena. In view of these considerations, we believe that the international rules for limits on power flux density and for coordination and notification will best assure that existing systems in the bands are protected from harmful interference. Therefore we are listing footnotes 731E and 753F in the domestic Table of Frequency Allocations. Accordingly, MSS operations in the 1610-1626.5 and 2483.5-2500 MHz bands will be subject to the e.i.r.p. and power flux density levels set forth in RR731E and RR2566, respectively. In addition, such MSS operations will be subject to the coordination and notification procedures set forth in Resolution 46. U.S. licensees must comply with these coordination requirements when they coordinate their respective systems internationally. We are also including footnote 733E in the domestic Table of Frequency Allocations to ensure that the radio astronomy service is protected.

26. To ensure that existing services are protected through the coordination procedures established at the WARC-92 and to conform our domestic Table of Frequency Allocations to the WARC-92 allocations we are amending the Table of Frequency Allocations by adding international footnotes 731E, 731F, and 753F; modifying international footnotes 733A, 733E, 734, 753, and 753C; and deleting international footnotes 731A, 731B, 731C, 731D, 753E, 877, 878, 890, and 891. Finally, we are amending non-Government footnote NG147 to reflect the allocation we are adopting.[27]

27. *Feeder Links.* In the *Notice,* we declined requests by the MSS LEO petitioners to propose specific new allocations for MSS feeder links. We stated that the existing fixed-satellite service (FSS) bands should provide sufficient capacity to serve the needs of MSS LEO feeder links and noted that these fixed satellite allocations can be used for feeder links, subject to normal frequency coordination.[28]

28. The MSS LEO proponents continue to argue that specific feeder link frequencies should be provided for MSS LEO operation.[29] The MSS NRMC analyzed the need for additional spectrum for feeder links and concluded that using portions of the 6425-6725 MHz bands for uplink feeder operations, as proposed by some of the applicants, appears possible. However, it also concluded that difficulties may arise with respect to using 5150-5216 MHz for downlink feeder operations.[30] The MSS NRMC therefore examined all of the downlink FSS bands between 3 and 15 GHz and concluded that if the 5150-5216 MHz band is not available, the Commission should identify at least 66 megahertz between 3 and 15 GHz for assignment to MSS LEO satellite feeder links.[31] The MSS NRMC stated that such a band could be utilized in conjunction with its recommended uplink feeder link band at 6425-6725 MHz and identified possible alternative downlink bands at 3600-3700 MHz and 10.95-11.20/11.45-11.70 GHz.

29. We continue to believe that, at least initially, the existing FSS bands are sufficient to begin accommodating MSS feeder links. We note that there may be difficulties in using FSS bands that generally are congested with significant numbers of GEO FSS systems. Consequently, because of the significant coordination difficulties arising from the global nature of LEO operations, MSS LEO feeder links would need to operate in FSS frequency bands that are not heavily used by GEO FSS systems.[32]

30. In the *Notice* we noted that RR2613, as modified at WARC-92, effectively limits non-geostationary satellite operations to secondary status with respect to geostationary operations in the FSS bands.[33] We questioned the effect this rule would have on the availability of frequencies in the FSS bands for non-GEO MSS feeder links. MSS LEO proponents generally argue that this international rule was not intended to relegate non-GEO feeder links to secondary status because feeder links themselves are a fixed operation. COMSAT, Ellipsat, Loral, and Constellation all

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[27] NG147 recognizes "grandfather" rights for fixed services in existence prior to the RDSS spectrum allocation decision. We are recognizing the right of these fixed services with regard to MSS as well.

[28] We also specifically declined to propose the 5150-5216 MHz (downlink) RDSS feeder link band for MSS or mixed MSS/RDSS feeder link use, as requested by Loral. We stated in the *Notice* that such use did not appear to be compatible with aeronautical radionavigation uses currently operating in the band.

[29] *See, e.g.,* Constellation at 9 and Ellipsat at 8.

[30] The FAA is proposing to implement new navigation aids in the 5150-5250 MHz band. These include Differential Global Positioning System (DGPS) and Automatic Dependent Surveillance (ADS). The MSS NRMC concluded that significant interference from DGPS and ADS into MSS LEO feeder link downlink frequencies may occur if the FAA planned systems are implemented. The FAA also stated to the MSS NRMC that the aviation community believes that there may be difficulty using these frequencies for MSS LEO feeder links outside the United States because they are allocated to aeronautical radionavigation on a worldwide basis.

[31] *See* Committee Report, *supra* note 12 at Annex 3, Section 4.1.1.

[32] The 6425-6725 MHz band is available now, but only in the Earth-to-space (uplink) direction. Another option might be to consider reverse band operations in certain FSS bands for feeder links to MSS systems only. Further, we have approached NTIA on the issue of using the 5150-5250 MHz band for MSS feeder links and NTIA stated in a letter on October 15, 1993, that they oppose use of this band for MSS feeder links but are willing to work with the Commission in defining and evaluating the various options to satisfy this need. We are placing a copy of this letter from Richard D. Parlow, Associate Administrator, NTIA to Thomas P. Stanley, Chief Engineer, FCC, into ET Docket 92-28. We also will consider the availability of the 3600-3700 MHz (space-to-Earth) or 10.95-11.20/11.45-11.70 MHz (space-to-Earth) as well as the 20/30 GHz bands.

[33] RR 2613 states that "Non-geostationary space stations shall cease or reduce to a negligible level their emissions, and their associated earth stations shall not transmit to them, whenever there is insufficient angular separation between non-geostationary satellites and geostationary satellites resulting in unacceptable interference1 to geostationary-satellite space systems in the fixed-satellite service operating in accordance with these Regulations." (note 1 states "The level of accepted interference shall be fixed by agreement between the administrations concerned, using the relevant CCIR Recommendations as a guide.")

maintain that RR2613 does not affect the availability of FSS frequencies for MSS feeder links.[34] After study, the MSS NRMC concluded that sharing between non-geostationary and geostationary systems is feasible with prior coordination, but recommended that the U.S. seek international agreement that RR2613 would not be invoked to terminate operations of non-geostationary systems unless certain conditions were met.[35] We generally agree with the MSS NRMC's interpretation of RR2613 and intend to explore issues related to coordination between non-geostationary and geostationary systems in the appropriate international fora. Additionally, we will be investigating all options to ensure that adequate unencumbered spectrum is available for accommodating both immediate and future feeder link requirements.

31. *Inter-Satellite Links.* In the *Notice,* we proposed to adopt the inter-satellite service (satellite-to-satellite) frequency allocations approved internationally at WARC-92 for the 24.45-24.65, 24.65-24.75, 25.25-25.5, 25.5-27, and 27-27.5 GHz bands. No party objected to this proposal. However, based on discussions with NTIA, we conclude that the inter-satellite service links at 25.25-27.5 MHz were intended to be used only for government inter-satellite service operations and therefore in this proceeding we are not reserving these bands for use by non-government entities. However, we are including the inter-satellite service bands at 24.45-24.65 and 24.65-24.75 GHz and the already allocated inter-satellite service band at 22.55-23 GHz in the United States Table of Frequency Allocations for non-government use.

32. *RF Radiation Limits.* In the *Notice,* we expressed concern with the potential for MSS consumer devices to generate radiation that could harm human health. We observed that although the power levels likely to be used by most consumer devices in this service should be relatively low, in some cases, especially where hand-held units are used, emissions could be in close proximity to users and non-users. Since 1985 the Commission has used the 1982 RF exposure guidelines of the American National Standards Institute and the Institute of Electrical and Electronics Engineers (ANSI/IEEE) for evaluating environmental exposure to RF fields.[36] We recently proposed to adopt the new 1991 version of the ANSI/IEEE guidelines to replace the 1982 guidelines.[37]

33. Motorola states that hand-held devices used for mobile satellite communications can operate safely within the provisions of the new ANSI/IEEE guidelines. Similarly, TRW states that it has developed hand-held transceivers for its MSS LEO system that will comply with the new ANSI/IEEE guidelines.[38] With respect to concerns that digital formats might be less safe than analog formats, TRW states that its system uses digital signaling formats with electromagnetic characteristics that are substantially the same as that of analog signals and that digital formats pose no greater risk with respect to RF exposure. TRW notes that non-geostationary spread spectrum CDMA systems propose to use low-power, hand-held devices that transmit at approximately 0.5 watts. CELSAT states that its handsets will operate at very low power levels, less than 0.1 watt average power, and that devices for its system that require higher powers will be operated far enough from the user to preclude any potential exposure hazard.

34. On the other hand, according to TRW, hand-held devices used in conjunction with geostationary MSS GEO systems might pose a health risk because they must transmit with higher power to communicate with satellites that are farther away. AMSC agrees that there is potential for some hand-held units used with MSS GEO systems to present a potential health hazard to humans. Its analysis of a 2-watt hand-held unit operating at 1613 MHz predicts a PFD flux density that would exceed the proposed new RF exposure guidelines. AMSC however states that its first generation system will use only vehicular-mounted units, and therefore that its proposed system poses no safety problem. AMSC states that the hand-held units to be used with its second generation system will comply with the proposed new RF exposure guidelines. Loral questions AMSC's analysis, maintaining that AMSC did not use the proper antennas, frequencies, and equations in arriving at its conclusions and did not correctly analyze RF hazards in accordance with the ANSI/IEEE guidelines. Loral submits that, in any event, we should use the new ANSI/IEEE guidelines in evaluating MSS systems. TRW, on the other hand, urges that we resolve issues related to RF exposure safety and MSS operations in a separate proceeding.

35. In view of the important health issues involved, the fact that no general manufacture of consumer equipment for MSS in these bands has yet begun, and our intent to provide for the expeditious initiation of the services for which this spectrum is being allocated, we believe the new ANSI/IEEE guidelines should be used when evaluating the potential for harm to public health from exposure to RF emissions of MSS user devices. If we modify the new ANSI/IEEE guidelines in ET Docket No. 92-62, those

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[34] *See* COMSAT at 4; Ellipsat at 8; Loral at 18; and Constellation at 9.

[35] The MSS NRMC suggested that three conditions be met before RR 2613 can be invoked to require a non-GEO system to cease or reduce transmissions in order to protect a GEO system. First, the administrations of the systems involved must engage in bilateral or multilateral discussions and reach agreement as to a level of "accepted interference" (RR162). Second, after the systems are in operation, the non-GEO system must exceed the level of interference agreed to. Third, the interference in excess of the agreed level must be caused by the failure of the non-GEO system to maintain sufficient angular separation between the satellites of the two systems.

[36] *See* 47 C.F.R. § 1.1307(b). *See also* ANSI C95.1-1982, "American National Standard Safety Levels with Respect to Human Exposure to Radio Frequency Electromagnetic Fields, 300 kHz to 100 GHz," American National Standards Institute.

[37] *See Notice of Proposed Rule Making (RF Guidelines ET Docket No. 93-62, 8 FCC Rcd 2849 (1993); see also* IEEE C95.1-1991, "Safety Levels with Respect to Human Exposure to Radio Frequency Electromagnetic Fields, 3 kHz to 300 GHz" (1991 ANSI/IEEE Guidelines), approved September 26, 1991 by the IEEE, published April 27, 1992, and adopted by the ANSI November 18, The recommended compliance criteria for hand-held, low-power devices are set forth in terms of the device's radiated power or the specific absorption rate (SAR) created by the device. *See* Section 4.2 of the 1991 ANSI/IEEE Guidelines or the *RF Guidelines Notice.*

[38] The 1991 ANSI/IEEE guidelines incorporate generally stricter criteria for hand-held transmitters operating in the range 450-1500 MHz. We requested the IEEE to address whether interpretation as to whether the formulas used to define exclusions based on radiated power can be used for frequencies up to 2.2 GHz. IEEE responded that use of the formula up to 2.2 GHz would be conservative.

guidelines will be applied to MSS equipment. Rules adopted in the instant proceeding which do not conform with the final rules adopted in ET Docket No. 93-62 will be amended accordingly. Thus, for the purpose of type accepting equipment, we will require that all hand-held devices comply with the new ANSI/IEEE specifications for "uncontrolled" environments because the new MSS service as envisioned would include consumer use that would be within the "uncontrolled" definition.[39]

OTHER MATTERS

36. In the *Notice*, we elected not to propose to allocate a portion of the 1610-1626.5 and 2483.5-2500 MHz bands for a hybrid satellite and terrestrial personal communications service as requested by CELSAT, finding that the terrestrial component of such proposed use was not authorized in the international allocation.[40] CELSAT filed a Petition for Reconsideration of our dismissal of the portion of its Petition for Rule Making that related to these bands.[41] CELSAT argues that the satellite element of its proposal is severable from its terrestrial element and compatible with WARC-92 decisions.[42]

37. CELSAT misconstrues our proposal and treatment of its petition. Insofar as CELSAT requested a spectrum allocation for geostationary MSS, in the *Notice* we proposed to allocate this spectrum to MSS and explicitly noted that the proposal includes both geostationary and non-geostationary use. We declined only to propose an allocation that would authorize terrestrial use of these bands because terrestrial use is inconsistent with the international allocation adopted at WARC-92.

ORDERING CLAUSES

38. In accordance with the requirements of the Regulatory Flexibility Act of 1980, 5 U.S.C. Section 608, the Commissions Final Regulatory Flexibility analysis is set forth in Appendix A.

39. Accordingly, IT IS ORDERED, that Part 2 of the Commission's Rules and Regulations IS AMENDED as specified in Appendix B, effective 30 days after publication in the Federal Register. IT IS FURTHER ORDERED that TRW's Motion to Dismiss CELSAT's Petition for Reconsideration IS GRANTED IN PART; and that the Petition for Reconsideration filed by CELSAT IS ACCEPTED as a comment. This action is taken pursuant to Sections 4(i), 303(c), (f), (g), and (r), and 309(a) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 303(c), (f), (g), and (r).

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Appendix A: Final Regulatory Analysis

Pursuant to 5 U.S.C. Section 603, an initial Regulatory Flexibility Analysis was incorporated in the *Notice*, in ET Docket No. 92-28. Written comments on the proposals in the *Notice*, including the Regulatory Flexibility Analysis, were requested.

Need for and Objective of Rules. The objective of our actions herein is to accommodate demand for voice and data services that can be provided by mobile-satellites in the 1610-1626.5 and 2483.5-2500 MHz bands. We expect that implementation of this new service will satisfy a growing demand for voice, data messaging, and position determination services at an affordable cost.

Issues Raised by the Public in Response to the Initial Regulatory Flexibility Analysis. Several parties suggested modifications to the proposals set forth in the *Notice*, although not specifically in response to the initial regulatory flexibility analysis. For example, several parties requested clarification of the applicability of the international footnotes on the domestic allocation and the feeder link frequencies that could be utilized for delivery of non-GEO MSS. As a result, we have made appropriate modifications to our proposals and clarified the points raised in the comments.

Any significant Alternative Minimizing Impact on Small Entities and Consistent with Stated Objectives. The alternative to allocating these bands to MSS is to accommodate this service in other spectrum. After balancing the needs of the MSS service with the option of allocating other spectrum for this service, we conclude that the bands proposed

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[39] The 1991 ANSI/IEEE guidelines specify two sets of exposure recommendations, one for "controlled" environments and the other for "uncontrolled" environments. Controlled environments are "locations where there is exposure that may be incurred by persons who are aware of the potential for exposure as a concomitant of employment, by other cognizant persons, or as the incidental result of transient passage through areas where analysis shows the exposure levels" may be above the exposure and induced current levels permitted for the general public, but not those permitted for persons aware of the potential for exposure. Uncontrolled environments are "locations where there is the exposure of individuals who have no knowledge or control of their exposure. The exposures may occur in living quarters or work places where there are no expectations that the exposure levels may exceed "the exposure and induced current levels permitted for the general public."

[40] CELSAT also had submitted an alternative request for spectrum at 2120-2129 and 2410-2428 MHz. Recently CELSAT filed to amend its Petition for Rule Making and now is seeking an allocation for its hybrid satellite and terrestrial service in the 1970-1990 and 2160-2180 MHz bands. *See* Petition for Rule Making, RM-7927, filed February 6, 1992; Motion to Amend filed July 8, 1993.

[41] TRW filed a Motion to Dismiss CELSAT's Petition for Reconsideration, arguing that our action declining CELSAT's proposal in the *Notice* was not a final action and therefore not subject to a Petition for Reconsideration. We agree with TRW, but are treating CELSAT's filing as a comment and considering the substantive issues raised therein inasmuch as the filing would have been accepted if filed as a comment.

[42] We also note that on April 1, 1991, the Common Carrier Bureau issued a public notice inviting license applications in the 1610-1626.5 and 2483.5-2500 MHz bands and established a final date of June 2, 1991 for filing such applications. CELSAT did not file a license application by the June 2, 1991 cut-off date. *See* Public Notice, "Satellite Applications Acceptable for Filing: Cut-off Established for Additional Applications," Report No. DS-1068, 6 FCC Rcd 2083 (1991).

are most desirable for MSS, are compatible with the international allocation, and are suitable for sharing with existing operations.

Appendix B: Rule Changes

I. Part 2 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 2 - - FREQUENCY ALLOCATIONS AND RADIO TREATY MATTERS: GENERAL RULES AND REGULATIONS

1. The authority citations in Part 2 continues to read:

AUTHORITY: Sec. 4, 302, 303, and 307 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154, 154(i), 302, 303, 303(r), and 307, unless otherwise noted.

2. Section 2.106, the Table of Frequency Allocations, is revised for the 1610-1626.5 MHz, 2483.5-2500 MHz, 22.5-23 GHz, and 24.25-24.75 GHz bands, in accordance with the following:

Section 2.106 Table of Frequency Allocations

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International Table			United States Table		FCC use designators	
Region 1 Allocation MHz	Region 2 Allocation MHz	Region 3 Allocation MHz	Government Allocation MHz	Non-Government Allocation MHz	Rule Part(s)	Special-Use Frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)
*	*	*	*	*		
1610-1610.6 AERONAUTICAL RADIONAVI-GATION. MOBILE-SATELLITE (Earth-to-space). 722 727 730 731 731E 732 733 733A 733B 733E 733F	1610-1610.6 AERONAUTICAL RADIONAVI-GATION. RADIODETER-MINATION SATELLITE (Earth-to-space). MOBILE-SATELLITE (Earth-to-space). 722 731E 732 733 733A 733C 733D 733E	1610-1610.6 AERONAUTICAL RADIONAVI-GATION. MOBILE-SATELLITE (Earth-to-space). Radiodeter-mination-Satellite (Earth-to-space). 722 727 730 731E 732 733 733A 733B 733E	1610-1610.6 AERONAUTICAL RADIONAVI-GATION. RADIODETER-MINATION SATELLITE (Earth-to-space). MOBILE-SATELLITE (Earth-to-space). 722 731E 732 733 733A 733E US208 US260 US319	1610-1610.6 AERONAUTICAL RADIONAVI GATION. RADIODETER-MINATION SATELLITE (Earth-to-space). MOBILE-SATELLITE (Earth-to-space). 722 731E 732 733 733A 733E US208 US260 US319	AVIATION (87). SATELLITE COMMUNICATION (25).	
*	*	*	*	*		

Section 2.106 Table of Frequency Allocations

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International Table			United States Table		FCC use designators	
Region 1 Allocation MHz	Region 2 Allocation MHz	Region 3 Allocation MHz	Government Allocation MHz	Non-Government Allocation MHz	Rule Part(s)	Special-Use Frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)
*	*	*	*	*		
1610.6-1613.8 AERONAUTICAL RADIONAVI-GATION. MOBILE-SATELLITE (Earth-to-space). RADIO-ASTRONOMY. 722 727 730 731 731E 732 733 733A 733B 733E 733F 734	1610.6-1613.8 AERONAUTICAL RADIONAVI-GATION. RADIODETER-MINATION SATELLITE (Earth-to-space). MOBILE-SATELLITE (Earth-to-space). RADIO-ASTRONOMY. 722 731E 732 733 733A 733C 733D 733E 734	1610.6-1613.8 AERONAUTICAL RADIONAVI-GATION. MOBILE-SATELLITE (Earth-to-space). RADIO-ASTRONOMY. Radiodeter-mination-Satellite (Earth-to-space). 722 727 730 731E 732 733 733A 733B 733E 734	1610.6-1613.8 AERONAUTICAL RADIONAVI-GATION. RADIODETER-MINATION SATELLITE (Earth-to-space). MOBILE-SATELLITE (Earth-to-space). RADIO-ASTRONOMY. 722 731E 732 733 733A 733E 734 US208 US260 US319	1610.6-1613.8 AERONAUTICAL RADIONAVI-GATION. RADIODETER-MINATION SATELLITE (Earth-to-space). MOBILE-SATELLITE (Earth-to-space). RADIO-ASTRONOMY. 722 731E 732 733 733A 733E 734 US208 US260 US319	AVIATION (87). SATELLITE COMMUNICATION (25).	
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Section 2.106 Table of Frequency Allocations

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International Table			United States Table		FCC use designators	
			Government	Non-Government		
Region 1 Allocation MHz	Region 2 Allocation MHz	Region 3 Allocation MHz	Allocation MHz	Allocation MHz	Rule Part(s)	Special-Use Frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)
*	*	*	*	*		
1613.8-1626.5 AERONAUTICAL RADIONAVI-GATION. MOBILE-SATELLITE (Earth-to-space). Mobile-Satellite (space-to-Earth). 722 727 730 731 731E 731F 732 733 733A 733B 733E 733F	1613.8-1626.5 AERONAUTICAL RADIONAVI-GATION. RADIODETER-MINATION SATELLITE (Earth-to-space). MOBILE-SATELLITE (Earth-to-space). Mobile-Satellite (space-to-Earth). 722 731E 731F 732 733 733A 732C 733D 733E	1613.8-1626.5 AERONAUTICAL RADIONAVI-GATION. MOBILE-SATELLITE (Earth-to-space). Radiodeter-mination-Satellite (Earth-to-space). Mobile-Satellite (space-to-Earth). 722 727 730 731E 731F 732 733 733A 733B 733E	1613.8-1626.5 AERONAUTICAL RADIONAVI-GATION. RADIODETER-MINATION SATELLITE (Earth-to-space). MOBILE-SATELLITE (Earth-to-space). Mobile-Satellite (space-to-Earth). 722 731E 731F 732 733 733E US208 US260 US319	1613.8-1626.5 AERONAUTICAL RADIONAVI-GATION. RADIODETER-MINATION SATELLITE (Earth-to-space). MOBILE-SATELLITE (Earth-to-space). Mobile-Satellite (space-to-Earth). 722 731E 731F 732 733 733E US208 US260 US319	AVIATION (87). SATELLITE COMMUNICATION (25).	
*	*	*	*	*		

]Section 2.106 Table of Frequency Allocations

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International Table			United States Table		FCC use designators	
Region 1 Allocation MHz	Region 2 Allocation MHz	Region 3 Allocation MHz	Government Allocation MHz	Non-Government Allocation MHz	Rule Part(s)	Special-Use Frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)
*	*	*	*	*		
2483.5-2500 FIXED. MOBILE. MOBILE-SATELLITE (space-to-Earth). Radiolocation.	2483.5-2500 FIXED. MOBILE. RADIODETERMINATION SATELLITE (space-to-Earth) 753A. RADIOLOCATION. MOBILE-SATELLITE (space-to-Earth).	2483.5-2500 FIXED. MOBILE. RADIOLOCATION. MOBILE-SATELLITE (space-to-Earth). Radiodetermination-Satellite (space-to-Earth). 753A.	2483.5-2500 RADIODETERMINATION SATELLITE (space-to-Earth) 753A. MOBILE-SATELLITE (space-to-Earth).	2483.5-2500 RADIODETERMINATION SATELLITE (space-to-Earth) 753A. MOBILE SATELLITE (space-to-Earth).	SATELLITE COMMUNICATION (25).	
733F 752 753 753A 753B 753C 753F	752 753D 753F	752 753C 753F	752 753F US41 US319	752 753F US41 US319 NG147		
*	*	*	*	*		

Section 2.106 Table of Frequency Allocations

* * * * *

International Table			United States Table		FCC use designators	
Region 1 Allocation MHz	Region 2 Allocation MHz	Region 3 Allocation MHz	Government Allocation MHz	Non-Government Allocation MHz	Rule Part(s)	Special-Use Frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)
	* *		* *	* *	*	
22.5-22.55	FIXED. MOBILE.		22.5-22.55 FIXED. MOBILE. US211	22.5-22.55 FIXED. MOBILE. US211	DOMESTIC PUBLIC FIXED (21). PRIVATE OPERATIONAL FIXED MICROWAVE (94).	
22.55-23	FIXED. INTER-SATELLITE. MOBILE. 879		22.55-23 FIXED. INTER-SATELLITE. MOBILE. 879 US278	22.55-23 FIXED. INTER-SATELLITE. MOBILE. 879 US278	DOMESTIC PUBLIC FIXED (21). PRIVATE OPERATIONAL FIXED MICROWAVE (94). SATELLITE COMMUNICATIONS (25).	
	* *		* *	* *	*	

Section 2.106 Table of Frequency Allocations

* * * * *

International Table			United States Table		FCC use designators	
Region 1 Allocation MHz	Region 2 Allocation MHz	Region 3 Allocation MHz	Government Allocation MHz	Non-Government Allocation MHz	Rule Part(s)	Special-Use Frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)

* * * * *

24.25-24.45 FIXED.	RADIONAVI- GATION.	RADIONAVI- GATION. FIXED. MOBILE.	24.25-24.45 RADIONAVIGATION.	AVIATION (87).	
24.45-24.65 FIXED. INTER- SATELLITE.	24.45-24.65 RADIONAVI- GATION. INTER- SATELLITE. 882E	24.45-24.65 RADIONAVI- GATION. FIXED. INTER- SATELLITE. MOBILE. 882E	24.45-24.65 INTER-SATELLITE. RADIONAVIGATION. 882E	SATELLITE COMMUNICATION (25).	
24.65-24.75 FIXED. INTER- SATELLITE.	24.65-24.75 INTER- SATELLITE. RADIO- LOCATION- SATELLITE (Earth-to- space).	24.65-24.75 FIXED. INTER- SATELLITE. MOBILE. 882E 882F	24.65-24.75 INTER-SATELLITE. RADIOLOCATION- SATELLITE (Earth-to-space).	SATELLITE COMMUNICATION (25).	

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INTERNATIONAL FOOTNOTES

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731A -- Deleted.

731B -- Deleted.

731C -- Deleted.

731D -- Deleted.

* * * * *

731E -- The use of the band 1610-1626.5 MHz by the mobile-satellite service (Earth-to-space) and by the radiodetermination-satellite service (Earth-to-space) is subject to the application of the coordination and notification procedures set forth in Resolution 46 (WARC-92). A mobile earth station operating in either of the services in this band shall not produce an e.i.r.p. density in excess of -15 dB(W/4 kHz) in the part of the band used by systems operating in accordance with the provisions of No. 732, unless otherwise agreed by the affected administrations. In the part of the band where such systems are not operating, a value of -3 dB (W/4 kHz) is applicable. Stations of the mobile-satellite service shall not cause harmful interference to, or claim protection from, stations in the aeronautical radionavigation service, stations operating in accordance with the provisions of No. 732 and stations in the fixed service operating in accordance with the provisions of No. 730.

731F -- The use of the band 1613.8-1626.5 MHz by the mobile-satellite service (space-to-Earth) is subject to the application of the coordination and notification procedures set forth in Resolution 46 (WARC-92).

* * * * *

733A -- With respect to the radiodetermination-satellite and mobile-satellite services the provisions of No. 953 do not apply in the frequency band 1610-1626.5 MHz.

* * * * *

733E -- Harmful interference shall not be caused to stations of the radio astronomy service using the band 1610.6-1613.8 MHz by stations of the radiodetermination-satellite and mobile-satellite services. (No. 2904 applies.)

734 -- In making assignments to stations of other services, administrations are urged to take all practicable steps to protect the radio astronomy service in the band 1610.6-1613.8 MHz from harmful interference. Emissions from space or air-borne stations can be particularly serious sources of interference to the radio astronomy service (see Nos. 343 and 344 and Article 36).

* * * * *

753 -- *Different category of service:* in France, the band 2450 - 2500 MHz is allocated on a primary basis to the radiolocation service (see No. 425). Such use is subject to agreement with administrations having service operating or planned to operate in accordance with the Table of Frequency Allocations which may be affected.

* * * * *

753C -- *Different category of service:* in Angola, Australia, Bangladesh, Burundi, China, Cote d Ivoire, Ethiopia, India, the Islamic Republic of Iran, Israel, Italy, Jordan, Kenya, Lebanon, Liberia, Libya, Madagascar, Mali, Pakistan, Papua New Guinea, Senegal, Sudan, Swaziland, Syria, Tanzania, Thailand, Togo, Zaire and Zambia, the allocation of the band 2483.5-2500 MHz to the radiodetermination-satellite service (space-to-Earth) is on a primary basis (see No. 425) subject to agreement obtained under the procedure of Article 14 with other countries not listed in this provision.

* * * * *

753E -- Deleted.

753F -- The use of the band 2483.5-2500 MHz by the mobile-satellite and the radiodetermination-satellite services is subject to the application of the coordination and notification procedures set forth in Resolution 46 (WARC-92). Coordination of space stations of the mobile-satellite and radiodetermination-satellite services with respect to terrestrial services is required only if the power flux-density produced at the Earth's surface exceeds the limits in No. 2566. In respect of assignments operating in this band, the provisions of Section II, paragraph 2.2 of Resolution 46 (WARC-92) shall also be applied to geostationary transmitting space stations with respect to terrestrial stations.

* * * * *

877 -- Deleted.

878 -- Deleted.

* * * * *

881A -- Use of the 25.25 - 27.5 GHz band by the inter-satellite service is limited to space research and Earth exploration-satellite applications, and also transmissions of data originating from industrial and medical activities in space.

881B -- Space services using non-geostationary satellites operating in the inter-satellite service in the band 27 - 27.5 GHz are exempt from the provisions of No. 2613.

* * * * *

882E -- The inter-satellite service shall not claim protection from harmful interference from airport surface detection equipment stations of the radionavigation service.

882F -- *Additional allocation:* in Japan, the band 24.65 - 25.25 GHz is also allocated to the radionavigation service on a primary basis until 2008.

882G -- In the band 24.75 - 25.25 GHz, feeder links to stations of the broadcasting-satellite service shall have priority over other users in the fixed-satellite service (Earth-to-space). Such other uses shall protect and shall not claim protection from existing and future operating feeder-link networks to such broadcasting satellite stations.

* * * * *

890 -- Deleted.

891 -- Deleted.

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UNITED STATES (US) FOOTNOTES

* * * * *

US319 -- In the 137 - 138, 148 - 149.9, 149.9 - 150.05, 399.9 - 400.05, 400.15 - 401, 1610 - 1626.5, and 2483.5 - 2500 MHz bands, Government stations in the mobile-satellite service shall be limited to earth stations operating with non-Government space stations.

* * * * *

NG147 -- Stations in the broadcast auxiliary service and private radio services licensed as of July 25, 1985, or on a subsequent date following as a result of submitting an application for license on or before July 25, 1985, may continue to operate on a primary basis with the mobile-satellite service and the radiodetermination satellite service.

* * * * *

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: January 25, 1994

BELL ATLANTIC PETITIONS FOR WAIVER OF SECTION 69.4(b)

Pleading Cycle Established

COMMENTS: February 24, 1994
REPLY COMMENTS: March 11, 1994

On December 7, 1993, the Bell Atlantic telephone companies (Bell Atlantic) filed a petition for waiver of Section 69.4(b) of the Commission Rules, 47 C.F.R. § 69.4(b). Bell Atlantic seeks a waiver to establish rate elements for operator call completion services that will be furnished to interexchange carriers. Bell Atlantic states that a grant of its waiver request would permit it to offer automated and live operator call completion services for interLATA collect, calling card and billed-to-third number calls. It also states that it will perform all operator functions on these calls, including branding collect call and billed-to-third number verification, calling card validation, and the call detail recording necessary for billing.

Bell Atlantic notes that Section 69.4 of the Commission's Rules does not prescribe rate elements for the foregoing operator services. Therefore, it seeks permission to establish the following new rate elements: (1) automated calling card handling, (2) automated collect and billed-to-third number handling and (3) live operator handling. Bell Atlantic states that the automated operator handling rates would be charged on a per call attempt basis and the live operator handling charge would be a per second rate for all call attempts which use a live operator.

Interested parties may file comments on Bell Atlantic's petition for waiver no later than February 24, 1994. Replies should be filed by March 11, 1994.

An original and four copies of all comments and replies must be filed in accordance with Section 1.51(c) of the Commission's Rules, 47 C.F.R. § 1.51(c). In addition, one copy of each pleading must be filed with International Transcription Services (ITS), the Commission's duplicating contractor, at its office at 2100 M Street, N.W., Suite 140, Washington, D.C. 20037 and one copy with the Chief, Tariff Division, Room 518, 1919 M Street, N.W., Washington, D.C. 20554.

For further information, contact Wanda M. Harris, Tariff Division, Common Carrier Bureau, (202) 632-6917.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ITT FEDERAL SERVICES CORP. File No. I-T-C-94-027

Application for Authority Pursuant to Section 214 of the Communications Act of 1934, to Establish Channels of Communication between the U.S. and INTELSAT Atlantic Ocean Region Satellites for the Provision of INTELSAT Business Service.

ORDER AND AUTHORIZATION

Adopted: January 13, 1994; Released: February 1, 1994

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, we find that the present and future public convenience and necessity require the provision of INTELSAT Busines Services (IBS) by ITT Federal Services Corp. (FSC).

2. Accordingly, IT IS ORDERED that application File No. I-T-C-94-027 IS GRANTED, and FSC is authorized to establish channels of communications between appropriately licensed earth stations in the U.S. and INTELSAT Atlantic Ocean Region (AOR) satellites for the provision of IBS between the U.S. and countries listed in Comsat's Tariff F.C.C. No. 103 for the space segment of IBS Service.

3. IT IS FURTHER ORDERED that the authority granted herein for FSC to establish channels of communication between the earth stations in the U.S. and the INTELSAT satellites does not dispense with the requirement that all such earth stations shall be authorized under Title III of the Communications Act of 1934, as amended, to communicate with those satellites.

4. IT IS FURTHER ORDERED that applicant shall file copies of any operating agreement it enters into with its foreign correspondents with the Commission within 30 days of its execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

5. IT IS FURTHER ORDERED that our authorization of FSC to provide private lines as part of its authorized service is limited to the provision of such private lines only between the United States and those countries listed in Comsat's IBS tariff -- that is, private lines which originate in the United States and terminate in one of those countries listed in Comsat's IBS tariff or which originate in one of those countries listed in Comsat's IBS tariff and terminate in the United States. In addition, FSC may not -- and FSC's tariff must state that FSC's customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or foreign end, or both, for the provision of international switched services, unless authorized to do so by the Commission upon a finding that the foreign administration affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates*, Phase II, First Report and Order, 7 FCC Rcd 559 (1991), and *Order on Reconsideration and Third Further Notice of Proposed Rulemaking*, 7 FCC Rcd 7927 (1992), *petition for reconsideration pending*.

6. IT IS FURTHER ORDERED that neither FSC nor any persons or companies directly or indirectly controlling or controlled by FSC, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which FSC or any persons or companies controlling or controlled by FSC are parties.

7. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

8. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

9. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.15(b) of the Commission's Rules, 47 C.F.R. §63.15(b).

10. This authorization is not to be construed as permitting the provision of any services between earth stations located within the U.S.

11. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Mariga Communications Corporation — File No. I-T-C-94-029-TC

Application for authority pursuant to Section 214 of the Communications Act of 1934, as amended, for authority to transfer control of Mariga Communications Corporation and subsequently assign its Section 214 authorization.

MEMORANDUM OPINION, ORDER & AUTHORIZATION

Adopted: January 13, 1994; Released: February 1, 1994

By the Chief, International Facilities Division:

1. On November 2, 1993, Mariga Communications Corporation (Mariga) and Mariga Holding Corporation (MHC)(collectively, the "Applicants") filed the above-captioned application, pursuant to Section 214 of the Communications Act of 1934, as amended, and Section 63.01 of the Commission's Rules, requesting authority to (i) transfer negative control of Mariga, and the international Section 214 authorization held by Mariga, to MHC; and (ii) subsequently assign Mariga's international Section 214 authorization to AGIRAM, by merging Mariga into AGIRAM. The application was placed on public notice on November 10, 1993 and no comments were received.

2. Mariga, a New York corporation, is authorized to acquire up to two 1.533 Mbps (T-1) circuits over the Ghorizont 12 satellite located at 14 degrees West Longitude (Statsionar 4) for the provision of private line service not interconnected with the public switched telephone network between the United States and the Russian Federation.[1] Mariga also has pending an application for authority to acquire up to one additional separate 1.544 Mbps circuit over the Ghorizont satellites located at 11 degrees West Longitude (Statsionar 11) for the provision of the same private line services.[2]

3. MHC, a Delaware corporation, is a wholly-owned subsidiary of The LuxCel Group, Inc. (LuxCel), also a Delaware corporation. MHC currently holds a non-controlling 49 percent interest in the outstanding stock of Mariga. MHC provides no telecommunications services subject to regulation under the Communications Act. However, LuxCel, and some of its other subsidiaries, hold radio common carrier and private carrier licenses to conduct mobile radio paging services.

4. AGIRAM is a newly-formed Delaware corporation whose officers, directors and ownership will be identical to the officers, directors and ownership of Mariga following MHC's acquisition of negative control of Mariga. AGIRAM is being formed for the sole purpose of changing the state law governing Mariga from New York to Delaware.

5. The transfer of control will take place pursuant to an Option Agreement between Mariga and LuxCel, dated January 21, 1993 (the "Agreement"), which gives LuxCel the option to acquire up to a 50% interest in Mariga in exchange for cash and stock. Upon Commission approval, LuxCel, through MHC, will exercise its option and acquire an additional 1.0% of newly issued shares of Mariga's capital stock, which will give MHC "negative" dejure control of Mariga. Upon closing of that transaction, Mariga will merge with and into AGIRAM. AGIRAM will be the surviving corporation and will succeed to and assume all of the rights and obligations of Mariga.

6. The Applicants state that a grant of this application will serve the public interest in promoting competition among international carriers by providing Mariga (and ultimately, AGIRAM), the opportunity to strengthen its position with greater financial resources and managerial expertise. In addition, after the transfer Mariga will be able to strengthen and expand its existing operations, providing increased competition.

7. In view of the foregoing, we conclude that the transfer of control of Mariga to MHC, and the immediately following assignment to AGIRAM of Mariga's international Section 214 authorization and pending application, will not adversely affect the public interest.

8. Accordingly, IT IS ORDERED, pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, and Section 63.01 of the Commission's Rules, 47 C.F.R. § 63.01, that the application of Mariga Communications Corporation, File No. I-T-C-94-029-TC, IS GRANTED and we consent to the transfer of control of Mariga to MHC, and the subsequent assignment from Mariga to AGIRAM of the international Section 214 authorization granted in File No. I-T-C-93-147 and the pending application in File No. I-T-C-94-030. However, the assignment of Mariga's Section 214 authorization and pending application to AGIRAM is contingent upon MHC first obtaining control of Mariga. If MHC fails to acquire control of Mariga as outlined in Mariga's application, then the assignment of the Section 214 authorization and pending application is not authorized to occur.

9. IT IS FURTHER ORDERED that AGIRAM is limited, under this order, to the provision of private line service not interconnected with the public switched telephone network between the United States and the Russian Federation through the establishment of up to two 1.544 Mbps (T-1) circuits via the Ghorizont 12 satellite located at 14 degrees West Longitude (Statsionar 4).

10. IT IS FURTHER ORDERED, pursuant to Section 203 of the Communications Act, as amended, 47 U.S.C. § 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, that AGIRAM must continue to maintain tariffs for the services authorized in this Order.

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[1] *Mariga Communications Corporation*, File No. I-T-C-93-147, 8 FCC Rcd 5228 (1993).
[2] FCC File No. I-T-C-94-030.

11. IT IS FURTHER ORDERED that AGIRAM must file annual reports of overseas telecommunications traffic as required by Section 43.61 of the Commission's Rules. 47 C.F.R. § 43.61.

12. IT IS FURTHER ORDERED that AGIRAM shall file a separate Section 214 application for the use of any additional circuits over this separate satellite system.

13. IT IS FURTHER ORDERED that no material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between AGIRAM and its foreign correspondent in the Russian Federation. A copy of each of the agreements shall be filed with the Commission within 30 days of its execution and shall otherwise comply with the filing requirements contained in §43.51 of the Commission's Rules, 47 C.F.R. §43.51.

14. IT IS FURTHER ORDERED that neither AGIRAM nor any persons or companies directly or indirectly controlling it or controlled by it, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the U.S., its territories or possessions, which is denied to any other U.S. carrier by reason of any concession, contract, understanding, or working arrangement to which the applicant or any persons or companies controlling it or controlled by it is a party.

15. IT IS FURTHER ORDERED that AGIRAM is authorized to provide private line service authorized herein using existing earth stations in the U.S. authorized to communicate with the Intersputnik satellite system at 14^0 W.L. or future earth stations which may be so authorized. Should AGIRAM wish to construct its own earth station to provide these services, an appropriate application under Title III of the Communications Act will be required.

16. IT IS FURTHER ORDERED that the continued effectiveness of this authorization is conditioned on the outcome of the review by the State Department and Commission as specified in paragraph 11 of the Commission's Order DA 91-621 (*see* 6 FCC Rcd 2932 (1991)). If the Commission is notified by the State Department that the continued use of the Ghorizont Satellite is no longer in the national interest, then this authorization will be subject to cancellation.

17. IT IS FURTHER ORDERED that AGIRAM shall submit a monthly report detailing the number and capacity of private line circuits in use over the Intersputnik system. The report shall also set forth AGIRAM's number and capacity of private line circuits in use over each communication system for the countries served by the Intersputnik system. These reports shall be filed no later than the 20th day of each month and shall include the required information for the previous month.

18. IT IS FURTHER ORDERED that our authorization of AGIRAM to provide private lines is limited to the provision of such private lines only between the United States and the Russian Federation -- that is, private lines which originate in the United States and terminate in the Russian Federation or originate in the Russian Federation and terminate in the United States. In addition, AGIRAM may not -- and AGIRAM's tariffs must state that AGIRAM's customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or the foreign end, or both, for the provision of international basic telecommunications services, including switched voice services, unless authorized to do so by the Commission upon a finding that Russian administration affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates*, Phase II, First Report and Order, 7 FCC Rcd 559 (1991), *Order on Reconsideration and Third Further Notice of Proposed Rulemaking*, 7 FCC Rcd 7927 (1992), *petition for reconsideration pending.*

19. IT IS FURTHER ORDERED that nothing in this authorization should be construed to include authorization for the transmission of money in connection with the services AGIRAM seeks authority to provide. The transmission of money is not considered to be a common carrier service. Therefore, nothing in this Order should be construed as containing authority for the transmission of money.

20. This order is issued under Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules, 47 C.F.R. §§ 1.106, 1.115, may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2), 47 C.F.R. § 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

National Broadcasting Company, Inc. File No. CSG-93-125-(6)-ML

Applications for Authority to Modify the Licenses of Six Temporary-Fixed Ku-band Earth Stations to Add the INTELSAT and Anik Satellite Systems for the Transmission of Television Signals Between the Continental United States and Points Within Alaska, Hawaii, U.S. Territories and Possessions

MEMORANDUM OPINION, ORDER & AUTHORIZATION

Adopted: January 21, 1994; Released: February 1, 1994

By the Chief, International Facilities Division:

1. On June 7, 1993, the National Broadcasting Company, Inc. (NBC) filed the above-captioned applications requesting authority under Title III of the Communications Act of 1934, as amended, to modify the licenses of six of its Ku-band domestic temporary-fixed transmit earth station facilities (Call Signs E920144, E900504, E870839, E920143, E870838, and E890799) to (i) add the INTELSAT satellite system as a point of communication for transmission of television program material and related communications to points within the continental United States from Alaska, Hawaii, American Samoa and other U.S. territories and possessions in the South Pacific; and (ii) add the Anik satellite system as a point of communications for television transmission to points within the continental United States from Alaska. These applications were placed on the Commission's public notice on June 23, 1993. Comments were separately filed by three domestic satellite providers, GTE Spacenet Corporation (GTE), GE American Communications, Inc. (GE), and Hughes Communications Galaxy, Inc. (Hughes)(collectively "the Domsats"). Reply comments were filed by NBC and Hughes.

2. NBC states that it seeks authority to access international satellites from points within U.S. territories where use of the domestic satellite network may not be practical. In particular, NBC states that the states of Alaska and Hawaii, and certain U.S. dependent territories in the Pacific Ocean do not fall within the "footprint" of any domestic satellite. Therefore, NBC seeks authority to use the INTELSAT system for the transmission of television program material and related communications to points within the continental United States from the following points: Alaska, Hawaii, American Samoa, Baker Island, Guam, Howland Island, Jarvis Island, Johnson Atoll, Kingman Reef, Midway Islands, Northern Marianna Islands, Palmyra Atoll and Wake Island. In addition, NBC states that circumstances exist where use of the Canadian Anik system may provide a more expeditious means of reaching points within the continental United States from the state of Alaska than use of INTELSAT. Consequently, NBC seeks authority to use the Anik system for the transmission of television program material and related communications from points within the state of Alaska to points within the continental United States.

3. In response, the Domsats state that there are a number of domestic satellites capable of providing coverage between the continental United States and Alaska and Hawaii. The Domsats recognize that in certain limited circumstances, the Commission has allowed INTELSAT and Anik capacity to be used to provide domestic, United States service, *i.e.* cases where either (i) no suitable facilities were available to meet the needs of the applicant, or (ii) the domestic portion of the service was incidental to a primarily international service. However, the Domsats state that NBC has not presented any facts in this case to support their request to use INTELSAT and Anik from Alaska and Hawaii at this time. NBC responds that these applications were filed for the purpose of obtaining advance authorization to use these satellites in urgent situations when service from suitable Ku-band domestic satellites is not available. NBC states that it intends to first review whether a suitable domestic satellite is available, and if not, then it would invoke its authorization to use INTELSAT or Anik satellites. Thus, NBC states it would eliminate the necessity to file an application and await grant of a license or Special Temporary Authority (STA).

DISCUSSION

4. The Commission generally requires U.S. earth station operators to use domestic space station facilities for domestic services. We have, however, in certain circumstances, permitted such operators to access INTELSAT and other countries' satellites for domestic services. For instance, pursuant to an exchange of letters between the United States and Canada, circumstances were identified where it would be in the interest of both countries not to preclude domestic satellite telecommunication systems from providing assistance to the other.[1] One of these circumstances is the temporary shortage of adequate domestic facilities. Thus, to gain access to a Canadian satellite, a domestic applicant must demonstrate that there are no domestic facilities available to meet the applicant's needs.[2] In regard to INTELSAT, the Commission has authorized the use of an INTELSAT satellite for domestic service only where the domestic portion of the service is incidental to a primarily international service.[3]

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[1] *See* Exchange of Letters of November 1972 by Bertram W. Rein, Deputy Assistant Secretary for Transportation and Communications, U.S. Department of State, with K.B. Williamson, Minister of the Embassy of Canada at Washington, and F.G. Nixon, Administrator, Telecommunications Management Bureau, Canadian Department of Communications, setting forth steps to be followed in the event Telesat Canada institutes international service. *See also* Exchange of Letters of August 24, 1982 by Allan Gotlieb, Ambassador of Canada, with Robert D. Hormats, Assistant Secretary for Economic and Business Affairs, U.S. State Department.

[2] *See Chevron Industries, Inc.*, 8 FCC Rcd 2726 (1993).

[3] *See Comsat Communications Corporation*, 8 FCC Rcd 1578 (1993).

5. Upon review of the above-captioned applications and related comments, we find that only a partial grant of NBC's applications would serve the present and future public convenience and necessity. NBC has not demonstrated that there is, or will likely be in the future, a lack of United States satellite capacity to serve Alaska and Hawaii. In addition, NBC has not shown that its planned use of INTELSAT capacity for service from Alaska and Hawaii is incidental to a primarily international service. In essence, NBC is asking for an advance blanket STA to utilize INTELSAT and Anik whenever NBC believes it is necessary in order to provide service from Alaska and Hawaii. However, neither the Commission nor the public would know in advance how much capacity NBC was proposing to use, how long NBC proposed to use the service, what the nature of the proposed service would be, and whether any domestic capacity could have been made available. These are questions that should be answered each time NBC desires to use international satellites for domestic service. Otherwise, the Commission has no way of monitoring the use of international capacity to make sure it is consistent with its policies. Therefore, NBC should file an STA request each time it desires to use an international satellite for domestic service from Alaska or Hawaii, unless it can specify an existing permanent situation where U.S. satellites are not able to provide a service.

6. In regard to NBC's request to use INTELSAT satellites for service from other U.S. territories and possessions in the South Pacific region, we find that grant of this request would be in the public interest. These areas are not served by U.S. domestic satellites and therefore may be properly served by use of the INTELSAT system.

7. In conclusion, we find that the partial grant of NBC's applications to modify the licenses of six of its domestic temporary-fixed transmit earth station facilities (Call Signs E920144, E900504, E870839, E920143, E870838, and E890799) to add the INTELSAT satellite system as a point of communication for transmission of television program material and related communications to points within the continental United States from American Samoa and other U.S. territories and possessions in the South Pacific will serve the public interest, convenience and necessity. However, we do not find that it would be in the public interest to modify these earth stations' licenses to add the INTELSAT or Anik satellite systems as points of communications for television transmission to points within the continental United States from Alaska or Hawaii.

8. Accordingly, IT IS ORDERED, pursuant to Section 309 of the Communications Act of 1934, as amended, and Section 201(c) of the Communications Satellite Act of 1962, as amended, that applications File No. CSG-93-125-(6)-ML ARE GRANTED IN PART and the licenses of NBC's domestic temporary-fixed transmit earth station facilities call signs E920144, E900504, E870839, E920143, E870838, and E890799 are modified to add the INTELSAT satellite system as a point of communication for transmission of television program material and related communications to points within the continental United States from American Samoa, Baker Island, Guam, Howland Island, Jarvis Island, Johnson Atoll, Kingman Reef, Midway Islands, Northern Marianna Islands, Palmyra Atoll and Wake Island.

9. IT IS FURTHER ORDERED that the portions of NBC's applications File No. CSG-93-125-(6)-ML requesting authority to modify the licenses of domestic temporary-fixed transmit earth station facilities call signs E920144, E900504, E870839, E920143, E870838, and E890799 to add the INTELSAT satellite system as a point of communication for transmission of television program material and related communications to points within the continental United States from Alaska and Hawaii, and to add the Anik satellite system as a point of communications for television transmission to points within the continental United States from Alaska ARE DENIED.

10. This order is issued under Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules, 47 C.F.R. §§ 1.106, 1.115, may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2), 47 C.F.R. § 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

John H. Markley NAL/Acct. No. 215FE0184
Vessel "Begin Again"
Registration # WN3319LL

ORDER

Adopted: January 13, 1994; Released: February 1, 1994

By the Chief, Field Operations Bureau:

I. INTRODUCTION

1. John H. Markley seeks reconsideration of the Ferndale Office's September 15, 1992, action finding him liable for a $500 forfeiture for unlicensed transmission on a maritime frequency. For the reasons stated below, the forfeiture is cancelled.

II. BACKGROUND

2. On July 27, 1992, an employee of the Commission's Ferndale Office intercepted transmissions on Marine Channel 28 (157.400 MHz) from a vessel identified as "Begin Again, WN3319LL". The station was not licensed.

3. On September 1, 1992, John H. Markley, the owner of the vessel, was issued a Notice of Apparent Liability (NAL) for $500 for operating on a marine frequency without a license. Mr. Markley responded with a letter dated September 9, 1992, stating that he was not transmitting when the violation occurred, but that the transmission may have been made by repairmen, who were performing maintenance on the boat that day.

4. On September 15, 1992, Mr. Markley was issued a Notice of Forfeiture affirming the original forfeiture. Mr. Markley requested reconsideration on September 28, 1992.

III. DISCUSSION

5. The licensee or operator of a radio is responsible for licensing and operation of the radio. At the time of the violative transmission, the radio station on board the vessel WN3319LL did not have an instrument of authorization from the Commission. Transcripts of this conversation seem to support Mr. Markley's assertion that someone other than he was responsible for these transmissions. It is the responsibility of the operator of the radio to ensure that it is licensed before operating it. As the evidence does not establish conclusively that Mr. Markley was the operator of the unlicensed station, we are cancelling the forfeiture.

V. ORDERING CLAUSES

6. IT IS ORDERED that a copy of this Order shall be sent certified mail, return receipt requested, to John H. Markley, 15387 S.E. 59th St., Bellevue, WA, 98006.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Precision Engineering Industries
Sun Valley, California

NAL/ACCT No. 315HF0005

For Monetary Forfeiture

FORFEITURE ORDER

Adopted: January 13, 1994; Released: February 1, 1994

By the Field Operations Bureau:

1. The Enforcement Division, Field Operations Bureau issued a Notice of Apparent Liability, 7 FCC Rcd 7920 (Enf Div, FOB, 1992), to Precision Engineering Industries (Precision) for willful violation of Section 302(b) of the Communications Act, 47 U.S.C. § 302(b), and Section 2.946(a) of the Commission's Rules, 47 C.F.R. § 2.946(a). Precision failed to supply a sample of a transmitter and receiver as requested by the Commission's Authorization and Evaluation Division.

2. Precision has not responded to or submitted any information to controvert the Commission's finding and has not supplied the requested equipment. The appropriate amount of the forfeiture in this case is $4,000.[1]

3. Since Precision has not responded to or otherwise challenged the Commission's finding of liability we are imposing the proposed forfeiture for willful violation of Section 2.946(a).

4. Accordingly, IT IS ORDERED that Precision Engineering Industries FORFEIT to the United States the sum of four thousand dollars ($4,000) for willful violation of Section 302(b) of the Act, 47 U.S.C § 302(b). This Forfeiture Order is authorized under Section 503(b) of the Communications Act.

5. IT IS FURTHER ORDERED that Precision Engineering Industries shall make such payment within 30 days of receipt of this Order. Payment should be made by check or money order payable to the Federal Communications Commission, noted with the NAL account number (315HF0005), and must be mailed to:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

6. IT IS FURTHER ORDERED that a copy of this Forfeiture Order be sent by certified mail - return receipt requested - to Precision Engineering Industries.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division

[1] The *1993 Policy Statement*, 8 FCC Rcd 6215 (1993), issued subsequent to this Notice of Apparent Liability, reduced the base forfeiture amount for this violation to $4,000.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Request of:

BATON ROGUE MSA LIMITED PARTNERSHIP — File No. MSD-92-39 416MS0001

Petition for an Order to Show Cause against United States Cellular Corporation in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block B, in Market No. 80, Baton Rouge MSA, for Station KNKA268

MEMORANDUM OPINION AND ORDER AND NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: January 26, 1994; Released: February 2, 1994

By the Acting Chief, Common Carrier Bureau:

I. INTRODUCTION

1. Baton Rouge MSA Limited Partnership (BRMSA) is the wireline licensee for the Baton Rouge, Louisiana, Metropolitan Statistical Area (MSA). Louisiana CGSA, Inc. (LCGSA),[1] the sole general partner in BRMSA, has petitioned the Commission for an Order to Show Cause why United States Cellular Company (USCC) should not be required to cease and desist and divest its interest in BRMSA based on USCC's failure to obtain prior approval of its acquisition of a 52 percent limited partnership interest in BRMSA. LCGSA also asserts that USCC has been attempting to take over control of the remaining 48 percent interest in BRMSA without obtaining Commission approval. LCGSA also argues that USCC lacks the basic character qualifications necessary to be a Commission licensee because it concealed that it was the controlling partner in the *La Star Cellular Telephone Company*[2] proceeding.

2. Upon review of the record, we determine that a violation of the rules occurred when USCC obtained a 52 percent interest in the license without prior Commission approval. Although LCGSA requests that we issue an order requiring USCC to show cause why it should not be required to cease and desist, we do not take that action at this time. Instead, because of the unauthorized transfer of ownership, we are finding BRMSA apparently liable for a forfeiture. We are additionally requiring that the appropriate forms be filed in order for the Commission to consider whether the transfer is in the public interest and should be granted.

II. BACKGROUND

3. As initially formed, the partners of BRMSA were: BRCGSA (LCGSA's predecessor in interest) with a 40 percent general partnership interest and an eight percent limited partnership interest, Star Cellular Telephone Company (SCTC) with a 24.5 percent limited partnership interest, and East Ascension Telephone Company, Inc. (EATEL) with a 27.5 percent limited partnership interest. LCGSA claims that USCC first acquired SCTC's interest in BRMSA without the knowledge of LCGSA. USCC entered into an agreement with SCTC to incorporate SCTC under the name Star Cellular Telephone Company, Inc. (Star, Inc.). The owners of Star, Inc. subsequently sold their 24.5 percent limited partnership interest to USCC. USCC, however, retained the name Star, Inc., so LCGSA was initially unaware any transfer occurred.

4. LCGSA claims that USCC then entered into an agreement with EATEL to have EATEL transfer its interest in BRMSA to Capitol Cellular, Inc. (Capitol). Capitol was owned by Data & Telecommunications, Inc. (D&T), which was owned by EATEL. Capitol was, therefore, an indirect subsidiary of EATEL. Thereafter, on May 16, 1988, USCC acquired the stock of D&T.[3] By acquiring all of the stock of D&T, USCC obtained control of Capitol as it was a wholly owned subsidiary of D&T, and therefore acquired Capitol's 27.5 percent limited partnership interest in BRMSA. Through these transactions, USCC acquired a 52 percent limited partnership interest in BRMSA. However, the named owners of the 52 percent limited partnership interest remain Star, Inc. and Capitol. BRMSA and USCC did not file for Commission approval of USCC's acquisition of a 52 percent interest in BRMSA.

5. LCGSA asserts that USCC, through Capitol, has further attempted to gain *de jure* and *de facto* control of BRMSA without prior Commission approval. LCGSA states that USCC sent BRCGSA and LCGSA a letter on March 30, 1992, declaring that because LCGSA was substituted for BRCGSA without the consent of Star, Inc. and Capitol, BRCGSA had taken an action which resulted in the withdrawal of BRCGSA as a partner.[4] LCGSA states that USCC's letter further stated that the remaining partners (both of which are owned by USCC) voted not to permit a transfer from BRCGSA to LCGSA, not to continue the business of the partnership with LCGSA, and to appoint Capitol as the general partner of BRMSA.

6. LCGSA contends that, on the same day that USCC sent LCGSA the above-described letter, it filed a Certificate of Amendment with the Secretary of State of Delaware to

[1] LCGSA is a wholly owned subsidiary of BellSouth Mobility, Inc. (BMI). LCGSA is the successor in interest to Baton Rouge CGSA, Inc. (BRCGSA). The Commission approved the *pro forma* transfer from BRCGSA to LCGSA on December 4, 1991. *See* Public Notice, Report No. CL-92-29, released Dec. 11, 1991.

[2] La Star Cellular Telephone Company, 6 FCC Rcd 6860 (I.D. 1991), *aff'd*, 7 FCC Rcd 3762 (1992), *appeal pending sub nom., Telephone and Data Systems, Inc.v. FCC*, Case No. 92-1273 (D.C. Cir.).

[3] LCGSA concludes that USCC then stripped D&T of Capitol's stock and transferred D&T back to EATEL. USCC retained control of Capitol, however.

[4] USCC made this claim based on Section 13.1 of the Agreement Establishing Baton Rouge MSA Limited Partnership (Partnership Agreement), which states that the general partner may assign its interest only after written notice to all other partners and consent from all the other partners.

amend the BRMSA Certificate of Limited Partnership. That amendment, claims LCGSA, declared, *inter alia*, that Capitol is the sole general partner of BRMSA.[5] Thereafter, on April 23, 1992, Capitol filed an FCC Form 490 Application requesting Commission consent to an involuntary transfer of control of BRMSA.[6]

7. LCGSA asserts that these facts demonstrate that USCC has violated Section 22.39(a)(1) of the Commission's Rules, which requires that transfers of control of Commission licenses be approved by the Commission and that any change from less than a 50 percent ownership to more than 50 percent be approved upon filing an FCC Form 490. LCGSA claims that USCC violated this section when it obtained Capitol's 27.5 percent interest in BRMSA, thereby changing its overall ownership in BRMSA from 24.5 percent to 52 percent.

8. Moreover, alleges LCGSA, Capitol has violated Section 310(d) of the Communications Act of 1934, as amended (the Act), which requires Commission approval before *de jure* or *de facto* control of a license may be acquired. LCGSA asserts that Star, Inc. and Capitol have continued the business of BRMSA with Capitol acting as the sole general partner.[7]

9. Finally, LCGSA contends that USCC is unqualified to hold any interest in BRMSA because of USCC's conduct in the *La Star Cellular Telephone Company* proceeding. In the *La Star* proceeding, USCC was a 49 percent partner of La Star Cellular Telephone Company, an applicant to provide cellular service to St. Tammany Parish in the New Orleans MSA. La Star's application was dismissed after an evidentiary hearing because it was found not to have been controlled by a wireline eligible party. The competing applicant, New Orleans CGSA, Inc., a sister company of LCGSA, raised several character arguments against USCC regarding USCC's conduct during the proceeding. Neither the presiding administrative law judge nor the Commission reached the merits of the character allegations. The Commission did state, however, in its decision, that the question of USCC's conduct in the *La Star* case may be revisited in future proceedings.[8] LCGSA asserts that if the Commission were to revisit the character allegations in the instant proceeding, it would find that USCC lacks the character qualifications necessary to be an interest holder in BRMSA. Because of the unauthorized transfer of control, the attempts by USCC to oust LCGSA as the general partner of BRMSA, and USCC's lack of character qualifications, LCGSA requests the Commission to initiate a proceeding against USCC in order to require it to divest its 52 percent interest in BRMSA.

10. USCC, in its Opposition, does not deny that it acquired the interests originally held by SCTC and EATEL in BRMSA. Instead, USCC argues that LCGSA had full knowledge of the transfers. USCC references several documents that it states would have made LCGSA aware of USCC's actions in acquiring SCTC and EATEL. Moreover, USCC asserts that Section 22.39 of the Rules does not deal with limited partnership interests of the sort involved here. In any event, USCC states that it would have been LCGSA's responsibility as general partner to seek authority for the transfers from the Commission. Finally, USCC argued that the Partnership Agreement gave it authority to oust LCGSA as the general partner and to allow Capitol to assume *de jure* control of BRMSA.[9]

III. DISCUSSION

11. Section 22.39(a) of the Commission's Rules[10] requires that all acquisitions of interest in a Commission licensee resulting in an equity ownership interest of 50 percent or greater be approved by the Commission through the filing of an application by the transferor and transferee. The rule applies to transfers regardless of whether actual voting control has changed. *See The Hinton Telephone Company of Hinton, Oklahoma*, 7 FCC Rcd 6643 (Com. Car. Bur. 1992), *aff'd on other grounds*, 8 FCC Rcd 5176 (1993) (transfer of a cellular company from an individual to a trust with the original owner as beneficiary required prior Commission approval).

12. The Commission has stated that because the responsibility for initiating a request for consent to a transfer of control lies with the licensee, any uncertainties as to whether a proposed transaction would result in a transfer within the meaning of the transfer rules are to be resolved by bringing the complete set of facts of the proposed transfer to the attention of the Commission, in advance of consummation of the transaction, for a determination whether Commission approval is required. *WHDH, Inc.*, 17

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[5] The amendment also designated BRMSA's business address as USCC's headquarters in Chicago.

[6] The FCC Form 490 filed by Capitol (File No. 05610-CL-TC-1-92) was dismissed by the Commission for failure to execute the transferor's portion of the application as required. Although Capitol sought a waiver of Section 1.743(a) of the Rules, the Commission denied the waiver request because the issues raised were matters of a private dispute beyond the Commission's regulatory jurisdiction. *See* Letter from Chief, Mobile Services Division, to Peter M. Connolly, Esq., dated May 5, 1992.

[7] USCC filed an action in the Delaware state courts seeking an injunction directing LCGSA to cooperate in the transfer of control of BRMSA from LCGSA to Capitol because of LCGSA's alleged breach of the contract when it acquired its predecessor's (BRCGSA) interest. In *Star Cellular Telephone Company, Inc. v. Baton Rouge CGSA, Inc.*, Civil Action No. 12507 (Del. Ch. July 30, 1993), the Delaware Chancery Court denied a summary judgement motion filed by USCC and granted LCGSA's cross-motion for summary judgement. The court found that the transfer from BRCGSA to LCGSA did not violate the Partnership Agreement or Delaware law.

[8] *See* La Star Cellular Telephone Company, 7 FCC Rcd at 3767, n.3.

[9] The Delaware Chancery Court has rejected this contention in the interim. *See* n.7, *supra*.

[10] Section 22.39 of the Rules provides, in pertinent part, that:

> (a) *Approval required.* Authorizations shall be transferred or assigned to another party, voluntarily . . . directly or indirectly or by transfer of control of any corporation only upon application and approval by the Commission.
>
> (1) A change from less that 50% ownership to 50% or more ownership shall always be considered a transfer of control.
>
> (2) In other situations a controlling interest shall be determined on a case-by-case basis . . . .

47 C.F.R. § 22.39(a).

FCC 2d 856 (1969), *aff'd sub nom., Greater Boston Television Corp, v. FCC*, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 903 (1971).

13. Based on the above, we find that Section 22.39 of the Commission's Rules was violated when USCC acquired Capitol's 27.5 percent interest in BRMSA because the transfer resulted in USCC's total holdings in the licensee corporation exceeding 50 percent without prior Commission approval. BRMSA and USCC neither sought nor were granted Commission approval of the transfer. Section 22.39(a) is clear and unambiguous in its terms that all transfers resulting in a change in ownership from less than 50 percent to more than 50 percent always require prior Commission approval. The rule speaks solely in terms of ownership and not control. Because USCC acquired more than a 50 percent ownership interest in BRMSA when it acquired Capitol, prior Commission approval should have been obtained. USCC's reliance on *McCaw Cellular Communications*, 66 Rad. Reg. 2d (P&F) 667 (1989), is misplaced, as it did not involve a situation where an interest of 50 percent or greater was obtained. Because the transfer of Capitol's interest in BRMSA to USCC required prior approval to be lawful, we require the parties to file the appropriate FCC Forms within 30 days of the release of this Order.

14. We do not find, however, that LCGSA has abdicated control of BRMSA. Although USCC attempted to oust LCGSA as the general partner and thus seize control of BRMSA, USCC was unsuccessful in its attempts. The Delaware Court denied USCC's action to require LCGSA to comply with USCC's request to place Capitol in control of BRMSA. We find, therefore, that LCGSA is still in control of BRMSA. Accordingly, Section 310(d) of the Communications Act, which requires Commission approval prior to the transfer of control of a cellular license, was not violated.[11]

15. Section 503(b) of the Act provides that the Commission is authorized to impose forfeiture penalties upon persons who "willfully or repeatedly" fail to comply with the Act or the Rules. Willful means that the violator knew it was taking the action in question, regardless of whether there was an intent to violate the rules. *See Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991). BRMSA, the licensee, knew that USCC, had acquired an additional interest in BRMSA that increased its total holdings to a level exceeding 50 percent ownership interest. Moreover, BRMSA knew that USCC acquired this interest without either BRMSA and USCC first obtaining Commission approval.[12] Additionally, the apparent unauthorized transfer occurred on May 16, 1988, when USCC knowingly acquired Capitol's interest in BRMSA and BRMSA has known of this violation at least since March 30, 1992. However, no application for consent for this transfer of control has yet been filed. Accordingly, the violation continued from May 16, 1988, to the present and is therefore repeated under Section 312(f)(2) of the Act.[13]

16. Pursuant to the Commission's *1993 Policy Statement, Standards for Assessing Forfeitures*, 8 FCC Rcd 6215 (1993), the base forfeiture for failing to file appropriate forms is $20,000. We find no downward adjustment factors under the *Policy Statement* present.

17. LCGSA has raised the issues discussed herein against USCC, in a Request for an Order to Show Cause why USCC Should not be Required to Cease and Desist. LCGSA is essentially requesting that the Commission begin a proceeding under Section 312 of the Communications Act against USCC. We deny LCGSA's petition because it is ultimately the licensee's responsibility to ensure compliance with the rules. *See Virginia RSA 6 Cellular Limited Partnership*, 7 FCC Rcd 8022 (1992); *Rhode Island Broadcasting Company*, 49 FCC 2d 1390, 1391 (Broadcast Bur. 1974); *WGOK, Inc.*, 2 FCC 2d 245, 246 (1965). Therefore, we do not find cause for a hearing against a partner in BRMSA and a forfeiture is correctly assessed against BRMSA, the licensee, and not USCC, a partner in the licensee. Furthermore, while Section 312 of the Communications Act gives the Commission the authority to issue orders to show cause against licensees and to revoke licenses in the event of rule violations, and although we find rule violations here, the record discloses no evidence of misrepresentation, lack of candor, or intention to violate the Act or our rules.[14] Additionally, because the Delaware court rejected USCC's attempts to oust LCGSA as the general partner, *de jure* control of the license did not change hands. The extraordinary remedy of revocation hearing is therefore not appropriate here.

18. Because no application is pending before the Commission at this time in which we need to pass on the qualifications of USCC to be a partner in BRMSA, we do not reach the allegations concerning USCC's character.

IV. CONCLUSION AND ORDERING CLAUSES

19. In conclusion, we find that Section 22.39 of the Commission's Rules was violated when USCC acquired Capitol's 27.5 percent interest in BRMSA without prior Commission approval. The transfer to USCC allowed USCC to gain more than a 50 percent ownership interest in the license and the rule explicitly requires prior Commission approval for such transfers. Because of the unauthorized transfer, BRMSA is apparently liable for a forfeiture.

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[11] LCGSA also argues that USCC violated the public notice requirements contained in Section 309 of the Communications Act. Section 309 places requirements on the Commission to place certain applications for transfers of control and assignments of license on public notice. The responsibilities for compliance are placed on the Commission. Accordingly, we do not find that USCC has violated this Section.

[12] A transfer of control application, FCC Form 490, requires that both the transferor, here BRMSA, and the transferee, here USCC, apply for such authority.

[13] Section 312(f)(2) of the Act states:

> The term "repeated," when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day.

47 U.S.C. § 312(f)(2).

[14] *See* Fox River Broadcasting, Inc., 93 FCC 2d 127, 129 (1983).

20. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b) and Section 1.80 of the Commission's Rules, 47 C.F.R. § 1.80, Baton Rouge MSA Limited Partnership IS APPARENTLY LIABLE FOR A FORFEITURE in the amount of Twenty Thousand Dollars ($20,000) for willful and repeated violations of the aforementioned rule provisions from May 16, 1988. The amount specified was determined after consideration of the factors set forth in Section 503(b)(2) of the Communications Act of 1934, as amended.

21. Payment of the forfeiture may be made by mailing a check or similar instrument, noting on the payment the File Number of the above captioned proceeding, to the Commission within thirty (30) days of the release date of this Order, payable to the order of the Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482.

22. Furthermore, IT IS ORDERED THAT the Request for an Order to Show Cause Against United States Cellular Corporation filed by Louisiana CGSA, Inc. IS HEREBY DENIED to the extent indicated herein.

23. IT IS FURTHER ORDERED that Baton Rouge MSA Limited Partnership file an FCC Form 490 requesting authorization to transfer 27.5 percent ownership interest from Capitol Cellular, Inc. to United States Cellular Corporation within thirty (30) days of the release of this Order.[15]

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Acting Chief, Common Carrier Bureau

[15] Failure of BRMSA to comply with the filing requirement to bring itself into compliance with the rules may require the initiation of a revocation proceeding against BRMSA pursuant to Section 312(a)(4) of the Communications Act.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: February 2, 1994

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON NECA'S 1994 PROPOSED MODIFICATIONS TO THE INTERSTATE AVERAGE SCHEDULE FORMULAS

The interstate average schedule formulas compensate more than six hundred local exchange carriers for the use of their facilities in originating and terminating interstate common carrier communications. On December 30, 1993, the National Exchange Carrier Association, Inc. ("NECA") filed modifications to the average schedule formulas that NECA proposes become effective July 1, 1994.

NECA states that the revisions will result in an average combined settlement increase in July 1994 of 1.7 percent over current formula levels. Specifically, NECA states that the total population of average schedule companies can expect an average increase of 15.1 percent above current settlement levels for the common line portion of settlements and an average reduction of 6.8 percent below current settlements for the traffic sensitive portion.

NECA states that the proposed revisions are based upon cost and demand data taken from a statistical sample of 176 average schedule companies and 190 cost companies. Changes in the formulas reflect cost growth, access demand growth, the impact of the Commission rule change governing the recovery of general support facility costs, recovery of contributions to the Telecommunications Relay Services fund, growth in carrier access billing system costs, introduction of an improved methodology for counting circuits as host/remote complexes, and the combining of SS7 settlement formulas.

Finally, NECA states that if approved, the proposed formulas will produce disbursements to average schedule companies that simulate the distributions that would be received by a cost company that is representative of average schedule companies, as required by Section 69.606 of the Commission's rules. NECA states that it will provide each average schedule company with information and worksheets needed to estimate individual impacts of the proposed revisions.

Comments on NECA's proposal may be filed by **March 1, 1994**, and reply comments by **March 15, 1994**, with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Kent Nilsson, Accounting and Audits Division, Common Carrier Bureau, FCC, Room 812, 2000 L Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: ITS, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of the pleading can be obtained from ITS, Inc. at (202) 857-3800.

We will treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally*, 47 C.F.R. §§ 1.1200-1.1216. For further information contact Kent Nilsson, Accounting and Audits Division, Common Carrier Bureau, at (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

FAMILY	File Nos. 52841-CM-P-92
ENTERTAINMENT	52876-CM-P-92
NETWORK, INC.	52877-CM-P-92

For Authority to Construct and
Operate Multipoint Distribution
Service Stations on the H Channels
at Sioux Falls, South Dakota

ORDER ON RECONSIDERATION

Adopted: January 27, 1994; Released: February 2, 1994

By the Chief, Domestic Facilities Division:

1. *Introduction.* Family Entertainment Network, Inc. (FEN) filed a petition for reconsideration of the dismissal of the above-referenced Multipoint Distribution Service (MDS) applications for the H channels at Sioux Falls, South Dakota by the Domestic Facilities Division (Division) on delegated authority, and requested reinstatement of these applications.[1] Sioux Valley Rural Television, Inc. (SVRTV) filed an opposition to the petition.[2]

2. *Background.* FEN filed these applications on December 31, 1991.[3] On June 2, 1993 and June 8, 1993, FEN filed amendments to its applications. Subsequently, Division staff initiated a qualification review of the applications, pursuant to 47 C.F.R. Sec. 21.32. Upon examination, the Division determined that the original applications filed by FEN failed to provide cochannel interference protection[4] within the protected service areas of all other authorized or previously proposed stations, pursuant to 47 C.F.R. Sec. 21.902(b)(3).[5] Therefore, FEN's applications were returned for failure to comply with the interference protection requirements of Section 21.902(b)(3) of the Commission's Rules. By letter dated September 8, 1993, the Division also returned the above-referenced amendments filed by FEN as unacceptable for filing.[6]

3. On reconsideration, FEN claims its proposed stations would not cause harmful interference to existing MDS operations. It argues that subsequent to the filing of its applications, the cochannel facilities at Colman were modified to change to a directional pattern oriented away from FEN's proposed transmit site. With this change, FEN asserts, that its proposal provides full interference protection to the modified Colman stations. Alternatively, FEN concedes that "its application|s| did not provide 45dB protection to an infinitesimal portion of the Colman stations' originally proposed protected service area."[7] However, FEN asserts that the interference cannot be deemed harmful, the level of interference is *de minimus*, and that a rigid application of the interference protection rules is inconsistent with established Commission policies. In addition, FEN requests a waiver of the cochannel interference standards of Sections 21.902(b)(3) and 21.902(f). Finally, FEN asserts that if not reinstated, it will be denied equal protection under the Fifth and Fourteenth Amendments in that the Division applied a more restrictive interference standard in its case.

4. In opposition, SVRTV first notes that FEN's applications, as initially filed, caused harmful cochannel interference, and were properly dismissed as defective. SVRTV states that an MDS/MMDS application must be complete and in a condition acceptable for filing as of the date the application is filed, otherwise it is unacceptable for filing and should be dismissed. SVRTV also rejects FEN's contention that its "minimal" deviation from the interference protection standards renders its proposal consistent with Section 21.902(b)(3). In addition, SVRTV states that FEN's request for waiver of the interference protection standards of Section 21.902(b)(3) is not justified.

5. *Discussion.* Section 21.19 of the Commission's rules provides that waivers may be granted upon application or on the Commission's own motion. A request for waiver must contain a statement of reasons sufficient to justify a waiver. A waiver will not be granted except upon an affirmative showing that:

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[1] We note that FEN entered into a "Settlement Agreement" with several other licensees and applicants for MDS/MMDS in the Sioux Falls and Colman, South Dakota area. This "Settlement Agreement", filed July 20, 1992, specifically stated that the Commission had to accept all terms of the agreement within ninety (90) days of its filing. As the Commission did not approve all provisions, by operation of the express terms of the agreement, the agreement became null and void.

[2] SVRTV is an H channel licensee and F-group channel licensee at Colman, South Dakota.

[3] FEN's applications were filed pursuant to Paragraph 2 of Appendix D of the *H-Channel Transition Order* which stated that interested parties may file new MDS applications for the H channels prior to January 2, 1992. *See* Amendment of Parts 21, 43, 74, 78, and 94 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 Ghz Bands Affecting: Private Operational-Fixed Microwave Service, Multipoint Distribution Service, Multichannel Multipoint Distribution Service, Instructional Television Fixed Service, and Cable Television Relay Service, 6 FCC Rcd 6792, 6817 (1991).

[4] Division staff found that FEN's H-1 application (File No. 52876-CM-P-92) caused harmful interference to H-1 channel WNEX781 in Colman. FEN's H-2 application (File No. 52841-CM-P-92) caused harmful interference to H-2 channel WNEX689 in Colman. Finally, FEN's H-3 application (File No. 53877-CM-P-92) caused harmful interference to H-3 channel WNTA301 in Colman.

[5] Section 21.902(b)(3) provides:

> As a condition for use of frequency in this service, each applicant, permittee and licensee is required to: ... Engineer the system to provide at least 45dB of cochannel interference protection within the protected service areas of all other authorized or previously proposed stations that transmit, or may transmit, signals for standard television reception.

[6] In reviewing the amendments, the Division stated that both amendments were filed in violation of the Commission's freeze on the filing of applications for new MDS/MMDS stations, and amendments to pending applications. Notice of Proposed Rulemaking, Amendment of Parts 1, 2, and 21, 7 FCC Rcd 3266, 3270 n.35 (1992)(PR Dkt. No. 92-80) (Notice).

[7] Petition for Reconsideration and Reinstatement, at 4.

> (a) the underlying purpose of the rule will not be served, or would be frustrated, by its application in this particular case, and the grant of the waiver is otherwise in the public interest; or
>
> (b) the unique facts and circumstance of a particular case render application of the rule inequitable, unduly burdensome, or otherwise contrary to the public interest.

Applicants must also show the lack of a reasonable alternative. *Wait Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969). "An applicant for waiver faces a high hurdle even at the starting gate. When an applicant seeks a waiver.... it must plead with particularity the facts and circumstances which warrant such action." *Id.* at 1157. *See Thomas Radio Co. v. FCC*, 716 F.2d 921 (1983).

6. FEN provides no separate statement outlining reasons to justify its waiver request. Instead, it maintains that the justification lies within the arguments presented in this petition. FEN therefore asserts that waiver of the cochannel interference protection standards is justified in that "FEN is not proposing a station that has even the remotest potential to cause interference to existing MDS operations that might experience harmful interference. To the extent FEN's application raised any interference concerns... those concerns have been rendered moot by the modifications to the Colman station.[8] In addition, even assuming the presence of an area of minimal interference, FEN asserts that no persons could possibly be affected by the purported interference, as no one lives within this area. Consequently, FEN maintains that sound public policy requires waiver of the cochannel interference standards. FEN's petition does not address whether there is a "lack of a reasonable alternative," as required by Section 21.19.

7. In applying Section 21.19 here, the issue presented is whether there is sufficient justification for a waiver of the interference protection standards established in Section 21.902(b)(3).

8. As an applicant for new MDS stations, FEN is required to demonstrate that its proposals will not cause harmful interference to previously proposed or authorized cochannel stations within 50 miles. The level of interference protection is established by Section 21.902(b)(3) of the Commission's Rules. This station engineering must be demonstrated at the time of application, pursuant to Section 21.902(c)(1) of the Commission's Rules, which provides *inter alia:*

> The following interference studies, as appropriate, shall be included with each application: An analysis of the potential for harmful cochannel interference with any authorized or previously proposed station(s), if: (i) the proposed transmitting antenna has an unobstructed electrical path to any part of the protected service area of any other station(s) that utilize(s), or would utilize, the same frequency; or (ii) if the proposed transmitter is within 50 miles of the coordinates of any such station....

See Sioux Valley Empire Electric Association, Inc., 3 FCC Rcd 7375 (1988).

9. While FEN's interference analyses indicated that there were authorized stations within 50 miles of its proposed transmitter site, it claimed that no harmful cochannel interference would result. Our analysis revealed that FEN's proposed station design failed to provide at least 45dB of cochannel interference protection to stations WNEX781, WNEX689, and WNTA301.[9] Therefore, the Division's conclusion that FEN failed to comply with the technical standard set forth in Section 21.902(b)(3) and 21.902(c)(1) regarding cochannel interference protection was proper.

10. Based upon these considerations, we do not find that it would be in the public interest to grant a waiver to FEN of the interference protection requirements of Sec. 21.902(b)(3). In addition, FEN has not demonstrated the "lack of a reasonable alternative" to the system proposed as required by Section 21.19. Therefore, FEN's waiver request is denied.

11. In the alternative, FEN acknowledges that the interference analyses filed demonstrates that there would be some cochannel interference. However, FEN argues, in effect, that the Division should ignore this admission, as well as its own evaluation of FEN's interference analyses, because the potential for interference is "de minimus." As FEN failed to demonstrate a lack of harmful interference and failed to comply with Commission rules, its applications were rendered unacceptable and returned. Section 21.20(a) states that an application will be unacceptable for filing if:

> (1) the application is defective with respect to completeness of answers to questions, informational showing, execution, or other matters of a formal character; or,
>
> (2) the application does not substantially comply with the Commission's rules, regulations, specific requests for additional information or other requirements.

12. Section 21.902 clearly outlines the demonstration required to be filed by an MDS/MMDS applicant. *See* Sections 21.902(b)(3), 21.902(b)(4), 21.902(c)(1), and 21.902(c)(2). These rule provisions clearly establish that the interference analysis, demonstrating lack of harmful interference, must be included with the application when it is initially filed. *See Roundtree Communications*, 7 FCC Rcd 5456 (1992); *see also Edna Cornaggia*, 8 FCC Rcd 5442 (1993). Thus, the filing of an interference analysis, which demonstrates lack of harmful interference is considered a basic requirement in determining the acceptability of an application.[10]

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[8] Petition for Reconsideration and Reinstatement, at 4.

[9] In fact, our calculations indicate that the desired/undesired signal ratios were less than 45dB in an area approximately equal to one square mile. In this one square mile area, the desired/undesired signal ratios ranged from 42.40dB to 44.88dB.

[10] All applicants are charged with being familiar with Part 21 of the Commission's rules that are relevant to MDS/MMDS. Any applicant who "either ignores or fails to understand clear and valid rules of the Commission respecting the requirements for an application assumes the risk that the application will not be acceptable for filing." Ranger v. FCC, 294 F.2d 240, 242 (1961). In addition, the demonstration of interference protec-

13. We reject FEN's claim that its applications should be granted because the level of interference to the Colman stations' originally proposed protected service area is *de minimus*.[11] Section 21.902(b)(3) requires that an applicant demonstrate 45dB of cochannel interference protection. In this rule provision, no reference is made to qualifying terms, degrees or levels, other than 45dB, at which interference would be deemed acceptable. Nevertheless, FEN argues that its applications should be reinstated despite its admission, and the fact, that interference exists. To support its request for reinstatement, FEN refers to the case of New Mexico Media, Ltd. (File No. 57497-CM-P-91). In that case, the Division granted New Mexico Media, Ltd., a waiver of the 45dB cochannel interference protection standard. However, similar treatment of FEN's applications is not warranted.[12] Inasmuch as Commission policy has not been changed with respect to the cochannel interference protection standard required of applicants, we reject FEN's assertion that grant of a waiver to New Mexico Media, Ltd. requires similar treatment here.[13]

14. Based upon these considerations, we also reject FEN's claim that the Commission engaged in unreasonable and arbitrary action. The Division's return of FEN's applications, as well as the return of its amendments, was not unreasonable or arbitrary, but rather was based on FEN's failure to comply with Commission rules.

15. Having carefully considered all of the arguments and evidence presented, we find that it was proper for the Division to return FEN's applications and return its amendments. Reconsideration and reinstatement *nunc pro tunc* is not warranted. Accordingly, IT IS ORDERED that the reconsideration petition filed by Family Entertainment Network IS DENIED. This order is issued pursuant to 47 C.F.R. Sec 0.291, and is effective on its release date. *See* 47 C.F.R. Secs. 1.4(b), 1.106, and 1.115.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

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tion, at the time of filing, aids the Commission in the public interest determination that an applicant is technically qualified to be an MDS/MMDS licensee. *See* 47 C.F.R. Sec. 21.13(a)(2).

[11] FEN asserts that the level of interference is within 0.16 dB of meeting the 45 dB cochannel standard. It states that consistent with Commission policy and the case of Patterson Broadcasting Co., 45 RR2d 120 (Broad. Bur. 1979), "rounding off" to the nearest dB would bring it into overall compliance with the 45dB standard. Here, by operation of Section 21.902(b)(3), 45dB interference protection must be demonstrated, and FEN failed to meet this requirement. *See* Amendment of Parts 21, 74 and 94 of the Commission's Rules and Regulations with regard to technical requirements application to the Multipoint Distribution Service, the Instructional Television Fixed Service and the Private Operational-Fixed Microwave Service (OFS), 56 RR 2d 187 (1984).

[12] To the extent the staff may have deviated from clearly articulated Commission precedent in the New Mexico case, that action was erroneous and is not controlling here. *See Quinnipiac College*, 8 FCC Rcd 6285 (1993); *Walter P. Faber, Jr.*, 4 FCC Rcd 5492, 5493 (1989), *recon denied*, 6 FCC Rcd 3601 (1991), *aff'd sub nom. Walter P. Farber, Jr. v. FCC*, No. 91-177 (D.C. Cir. June 4, 1992). The Commission is not required to treat as binding precedent waivers granted by staff action. The improvident grant of a waiver does not deprive the agency of authority to require future applicants to meet certain standards. *See North Texas Media, Inc. v. FCC*, 778 F.2d 28, 33 (D.C. Cir. 1985).

[13] FEN had the option of filing applications which demonstrated a lack of harmful interference. For example, FEN could have utilized different engineering design techniques, including change of site location, antenna height, radiation of the transmitting antenna, or reduction in transmitter power to avoid interference. *See* Section 21.902.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

BOYD B. HOPKINS, SR. File No. 52649-CM-P-90

For Authority to Construct and
Operate Multichannel Multipoint
Distribution Service Stations
on the E-Group Channels at
Sioux Falls, South Dakota

ORDER ON RECONSIDERATION

Adopted: January 27, 1994; Released: February 2, 1994

By the Chief, Domestic Facilities Division:

1. *Introduction.* Boyd B. Hopkins, Sr. (Hopkins) filed a petition for reconsideration of the dismissal by the Domestic Facilities Division (Division) on delegated authority, and requested reinstatement of his Multichannel Multipoint Distribution Service (MMDS) application for the E-group channels at Sioux Falls, South Dakota. Sioux Valley Rural Television, Inc. (SVRTV) filed an opposition to the petition for reconsideration and reinstatement.[1]

2. *Background.* Hopkins' application was filed on June 19, 1990 and was selected for qualification review as the result of a Commission lottery held on October 2, 1991. Thereafter, on August 5, 1992, and June 2, 1993, Hopkins filed amendments proposing to change the system's polarization, and geographic coordinates of the transmit site, respectively. Subsequently, Division staff initiated a qualification review of the application, pursuant to 47 C.F.R. Sec. 21.32. Upon examination, the Division determined that the original application failed to provide cochannel interference protection within the protected service areas of all other authorized or previously proposed stations, pursuant to 47 C.F.R. Sec. 21.902(b)(3).[2] Therefore, the application was dismissed for failure to comply with the interference protection requirements of Section 21.902(b)(3) of the Commission's Rules. By letter dated August 26, 1993, the Division also returned the above-referenced amendments filed by Hopkins as unacceptable for filing.[3]

3. On reconsideration, Hopkins argues that the Division's actions in dismissing his application represents a "fundamental and impermissible change in staff MDS processing policies without providing sufficient notice."[4] Hopkins states that he believed he would be permitted to file amendments to his application to ensure an interference-free operation.[5] He notes that the Division's decision to enforce the filing freeze represents a fundamental shift from a "substantial completeness" standard, to which amendments could be liberally filed, to a "letter perfect" standard.[6] Hopkins states that as he had no notice at the time of the filing of his application of the Commission policy regarding amendments, the dismissal of his application is arbitrary and capricious. In addition, Hopkins asserts that he was denied equal protection under the Fifth and Fourteenth Amendments in that the Division acted in an unreasonable and arbitrary manner in applying the filing freeze and not accepting his amendments. Notwithstanding his position regarding the Division's failure to accept his amendments, Hopkins also maintains his proposed station would not cause harmful interference to existing MDS operations. Finally, Hopkins states that the Commission did not clearly articulate the reasons for rejecting his waiver request.

4. In opposition, SVRTV first notes that Hopkins' application, as initially filed, caused harmful cochannel interference and was properly dismissed as defective. SVRTV also disagrees with Hopkins' assertion that the standard for processing MMDS applications has been elevated to a "letter perfect" standard. In addition, SVRTV states that Hopkins knew or should have known of the Commission's rules and policies regarding the proper filing of an MMDS application, specifically the requirements of Section 21.902(b)(3).

5. *Discussion.* The Commission authorized the filing of MMDS applications on one filing date, September 9, 1983, unless the application complies with the filing requirements set forth in *Public Notice*, 3 FCC Rcd 2661 (1988).[7] In accordance with Section 21.901(d)(4) of the Commis-

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[1] SVRTV is the licensee for the F-group channels at Colman, South Dakota. It is also an H channel licensee at Colman.

[2] Section 21.902(b)(3) provides:

> As a condition for use of frequency in this service, each applicant, permittee and licensee is required to: ... Engineer the system to provide at least 45dB of cochannel interference protection within the protected service areas of all other authorized or previously proposed stations that transmit, or may transmit, signals for standard television reception.

[3] In reviewing the amendments, the Division stated that both amendments were filed in violation of the Commission's freeze on the filing of applications for new MDS/MMDS stations, and amendments to pending applications. Notice of Proposed Rulemaking, Amendment of Parts 1, 2, and 21, 7 FCC Rcd 3266, 3270 n.35 (1992)(PR Dkt. No. 92-80) (Notice).

[4] Petition for Reconsideration and Reinstatement Nunc Pro Tunc at 3.

[5] Hopkins states that the above-referenced amendments were filed pursuant to a "Settlement Agreement" entered into with several other licensees and applicants for MDS/MMDS in the Sioux Falls and Colman, South Dakota area. This "Settlement Agreement", filed July 20, 1992, specifically stated that the Commission had to accept all terms of the agreement within ninety (90) days of its filing. As the Commission did not approve all provisions, by operation of the express terms of the agreement, the agreement became null and void.

[6] Under Part 21 practice, prior to the imposition of the filing freeze, the substantial compliance standard allowed applicants an opportunity to perfect and amend certain parts of their applications, pursuant to Section 21.23. *See*, Rulemaking to Amend Parts 1 and 21 of the Commission's Rules, Notice of Proposed Rulemaking, Order, Tentative Decision and Order on Reconsideration, 8 FCC Rcd 557, 564 (1993). It should be noted that the standard of "substantially complete" does not apply to Part 21 applications. Allen C. Moore, 86 FCC 2d 787 (Com. Car. Bur. 1981).

[7] MMDS Allocation Order, 94 FCC 2d 1203 (1983), authorized that only applications filed on September 9, 1983 would be

sion's Rules, the *Public Notice* states that MMDS applications may be submitted for filing for any location which is farther than fifty (50) miles from any proposed location of an MMDS application pending on April 19, 1988 or an existing authorized facility. In addition, MMDS applications must specify a transmitter site which is farther than 15 miles from the boundary of a statistical area for which there are MMDS applications pending as of April 19, 1988 or an existing authorized facility. The *Public Notice* advised that all applications filed must comply with the above location restrictions, and that grant of waivers of the location requirements were not anticipated.

6. The application filed by Hopkins proposes to locate its transmitter site at Sioux Falls, South Dakota. Hopkins' interference study shows that his transmitter site is within 50 miles of an authorized MMDS station and a site proposed in an 1988 MMDS application.[8] Specifically, Hopkins' transmitter site is approximately 35 miles from the transmitter site of E.M. Parsen's authorized cochannel station, WLK384, at Yankton, South Dakota and approximately 36 miles from the transmitter site proposed by Johnson at Colman, South Dakota.[9] Because Hopkins' proposed transmitter site is within 50 miles of WLK384 and Johnson's then-proposed site, Hopkins filed a request for waiver of the 50-mile location requirement. In addition, Hopkins requests a waiver of rule sections 21.31, 21.901(d)(5), and 21.902(i) "if deemed necessary by the Commission staff."[10]

7. Section 21.19 of the Commission's rules provides that waivers may be granted upon application and must contain a statement of reasons sufficient to justify a waiver. A waiver will not be granted except upon an affirmative showing that:

> (a) the underlying purpose of the rule will not be served, or would be frustrated, by its application in this particular case, and the grant of the waiver is otherwise in the public interest; or
>
> (b) the unique facts and circumstance of a particular case render application of the rule inequitable, unduly burdensome, or otherwise contrary to the public interest.

Applicants must also show the lack of a reasonable alternative. *Wait Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969). "An applicant for waiver faces a high hurdle even at the starting gate. When an applicant seeks a waiver.... it must plead with particularity the facts and circumstances which warrant such action." *Id.* at 1157. *See Thomas Radio Co. v. FCC*, 716 F.2d 921 (1983).

8. To justify his waiver request, Hopkins explains that his proposed system will expand the diversity of information available to local residents through the use of microwave transmission on four channels. He states that he expects that the system will provide entertainment, as well as educational and business service to the area, depending on customer demand. Further, Hopkins states that grant of the waiver will not frustrate the underlying purpose of the rules. He asserts that there are only two MMDS facilities for the area with which a non-interference demonstration must be made. Hopkins also states that a study demonstrating that there would be some interference to the cochannel and adjacent channel facilities, but which may be eliminated by cross-polarization, has been conducted. Therefore, Hopkins argues that application of the 50 mile rule would not be served in this case. Hopkins waiver statement does not address whether there is a "lack of a reasonable alternative," as required by Section 21.19.

9. In applying Section 21.19 here, a number of issues must be considered. The underlying purpose of the filing requirements specified in the *Public Notice* is to delineate applicant rights established in *Ashbacker v. FCC*, 325 U.S. 327, 333 (1945), and to outline the appropriate "cut-off" for 1983 applications *vis-a-vis* applications filed after April 20, 1988. The *Public Notice* location requirements also serve to increase administrative efficiency in determining which applications filed after April 20, 1988 are cut-off from comparative consideration. As stated, the cut-off deadline prevents placing Hopkins' application in the same category as previously-filed and authorized MMDS stations. Thus, the *Ashbacker* rights of station WLK384, as well as Johnson's application, would not be infringed by separate consideration of the later-filed Hopkins application. However, while these *Ashbacker* rights remain protected, a separate issue is the extent of interference which would result from the simultaneous operation of these stations.

10. As an applicant for a new MMDS station, Hopkins is required to demonstrate that his proposed station will not cause harmful interference to previously proposed or authorized cochannel stations within 50 miles. The level of interference protection is established by Section 21.902(b)(3) of the Commission's Rules. This station engineering must be demonstrated at the time of filing the application, pursuant to Section 21.902(c)(1) of the Commission's Rules, which provides *inter alia:*

> The following interference studies, as appropriate, shall be included with each application: An analysis of the potential for harmful cochannel interference with any authorized or previously proposed station(s), if: (i) the proposed transmitting antenna has an unobstructed electrical path to any part of the protected service area of any other station(s) that utilize(s), or would utilize, the same frequency; or (ii) if the proposed transmitter is within 50 miles of the coordinates of any such station....

See Sioux Valley Empire Electric Association, Inc., 3 FCC Rcd 7375 (1988).

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entitled to comparative consideration. Consequently, the *Order* limited comparative consideration, for purposes of inclusion in an MMDS lottery, to competing applications filed in 1983.

[8] Kevin Johnson's application for the E-group channels at Colman, South Dakota, filed on December 29, 1987 (File No. 50076-CM-P-88), was pending at the time Hopkins filed his application, although the application was subsequently dismissed on December 11, 1992.

[9] Pursuant to Section 21.31(a) of the Commission Rules, "[A]pplications will be mutually-exclusive if their conflicts are such that the grant of one application would effectively preclude by reason of harmful electrical interference... the grant of one or more of the other applications."

[10] Hopkins Waiver Request at 1.

11. Hopkins' interference analyses indicated that there was one cochannel application at Colman, South Dakota (Johnson's application) and one authorized station, WLK384 at Yankton, South Dakota, within 50 miles of his proposed station. Hopkins admits that there may be some harmful cochannel interference,[11] but that the interference could be eliminated by cross-polarization of the antenna. However, in the interference analyses filed with his application, Hopkins utilizes vertical polarization. Our analysis of Hopkins' interference study also reveals that proposed station design, as originally filed, failed to provide at least 45dB of cochannel interference protection. Based upon these considerations, we conclude that Hopkins failed to comply with the technical standard set forth in Section 21.902(b)(3) and 21.902(c)(1) regarding cochannel interference protection.

12. We do not find that it would be in the public interest to grant a waiver of the interference protection requirements of Sec. 21.902(b)(3). In addition, Hopkins has not demonstrated the "lack of a reasonable alternative" to the system proposed as required by Section 21.19. Therefore, Hopkins' waiver request is denied.

13. Although acknowledging that the interference analysis filed demonstrates that there would be some cochannel interference, Hopkins argues, in effect, that the Division should ignore this admission, as well as its own evaluation of Hopkins' interference analysis. As Hopkins failed to demonstrate a lack of harmful interference and failed to comply with Commission rules, his application was rendered defective, unacceptable for filing, and therefore was properly dismissed pursuant to Section 21.20(a).

14. While Hopkins argues that the Commission has adopted a "letter perfect" standard for determining the acceptability of an application for filing, Section 21.902 clearly outlines the demonstration required to be filed by an MMDS applicant.[12] This rule provision clearly establishes that the interference analysis, demonstrating lack of harmful interference, must be included with the application when initially filed. *See Roundtree Communications*, 7 FCC Rcd 5456 (1992); *see also Edna Cornaggia*, 8 FCC Rcd 5442 (1993). Thus, the filing of an interference analysis, which demonstrates lack of harmful interference is a requirement in determining whether an application is defective, and thus, unacceptable for filing. This requirement is not inconsistent with or a contradiction of the "substantial compliance" standard.[13]

15. In his petition, Hopkins also claims that because the Commission dismissed his amendments, he was denied his right to equal protection in that the Commission's dismissal action was unreasonable and arbitrary. We disagree. As indicated, the freeze on the filing of amendments applies to all MDS/MMDS applicants. Pursuant to the *Notice*, Division staff reviewed Hopkins' request for leave to amend, but found that waiver of the freeze on the filing of amendments was not justified. As Hopkins alleges an equal protection violation, he bears the burden of establishing a case of an uneven application of the rules. *See Berroteran-Melendez v. Immigration and Naturalization Service*, 955 F.2d 1251, 1258 (1992). Hopkins makes no such showing. Therefore, we find no basis to conclude that the Commission's dismissal of Hopkins' application, as well as his amendments, was unreasonable and arbitrary. Rather, the dismissal action was based on Hopkins' failure to comply with Commission rules.

16. Having carefully considered all of the arguments and evidence presented, we find that it was proper for the Division to dismiss Hopkins' application and return his amendments. Reconsideration and reinstatement of the application is not warranted. Accordingly, IT IS ORDERED that the reconsideration petition filed by Boyd B. Hopkins, Sr. IS DENIED. This order is issued pursuant to 47 C.F.R. Sec 0.291, and is effective on its release date. *See* 47 C.F.R. Secs. 1.4(b), 1.106, and 1.115.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

[11] Hopkins cites Austin Movie and Sports Cable, Inc. 66 RR 2d 1728 (1989) to support his position that the Commission should have granted his application, despite the admission that his station's operation would cause harmful interference. Hopkins reliance on *Austin* is misplaced. In that case, the Commission granted the application, based, in part, on the parties expressed willingness to comply with the Section 21.902(a) mandate to resolve and accept potential interference problems and the imposition of several conditions to grant to ensure interference-free operation. Here, no such demonstration by potentially affected parties was presented by Hopkins.

[12] Hopkins' states that the Division's failure to accept the amendments and its decision to enforce the filing freeze, represents this fundamental shift to a "letter perfect" standard. Contrary to Hopkins' assertions, the *Notice*, adopted April 9, 1992, discussed the justification and details of the freeze on the filing of MDS/MMDS applications. It specifically stated that the freeze would be equally applicable to the amendment of pending applications. *Notice*, 7 FCC Rcd at 3270 n.35. Hopkins amendments were considered, but returned, pursuant to the provisions outlined in the *Notice*. Notice was sufficiently given to Hopkins regarding the freeze on the filing of new applications, as well as the filing of amendments. However, at issue is the fact that Hopkins' application, as initially filed, failed to demonstrate a lack of harmful interference.

[13] All applicants are charged with being familiar with Part 21 of the Commission's rules that are relevant to MMDS. Any applicant who "either ignores or fails to understand clear and valid rules of the Commission respecting the requirements for an application assumes the risk that the application will not be acceptable for filing." Ranger v. FCC, 294 F.2d 240, 242 (1961). In addition, the demonstration of interference protection, at the time of filing, aids the Commission in the public interest determination that an applicant is technically qualified to be an MMDS licensee. *See* 47 C.F.R. Sec. 21.13(a)(2).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Sioux Valley Rural Television, Inc.
Application for Renewal of
Conditional License for Multichannel
Multipoint Distribution Service Station
WHI959 on the F-group channels at
Colman, South Dakota

FILE NO. 57860-CM-R-91

MEMORANDUM OPINION AND ORDER

Adopted: January 27, 1994; Released: February 2, 1994

By the Chief, Domestic Facilities Division:

1. *Introduction.* This is in regard to the above-referenced renewal application of Sioux Valley Rural Television, Inc. (SVRTV). SVRTV's conditional license to operate on the F-group channels at Colman, South Dakota was issued December 30, 1988. On March 28, 1991, SVRTV filed an application for renewal of its station license. On May 20, 1991, Family Entertainment Network, Inc. (FEN) and Kevin Johnson (Johnson), an officer, director and employee of FEN, (collectively referred to as Petitioners), jointly filed a Petition to Deny challenging SVRTV's renewal application.

2. *Petition to Deny.* Petitioners assert that SVRTV violated its license restriction prohibiting service to Sioux Falls by "transmitting into" the Sioux Falls service area; SVRTV caused interference to subscribers to FEN's Yankton system who reside in Sioux Falls; SVRTV behaved in an anti-competitive manner; and that SVRTV's certification of construction completion and its renewal application do not accurately reflect SVRTV's MMDS station at Colman.

3. Petitioners contend that in December, 1989 and January, 1990, SVRTV transmitted signals into the Sioux Falls MSA, in violation of the condition imposed on SVRTV's authorization. In *Sioux Valley Empire Electric Association, Inc.*, 3 FCC Rcd 7375 (1988), the Domestic Facilities Division, Common Carrier Bureau, expressly stated that: "This authorization is conditioned on the requirement that the licensee may not provide service, directly or indirectly, nor receive revenue, directly or indirectly, from provision of service to any receiver sites within the Sioux Falls Metropolitan Statistical Area." *Id.* at 7378. FEN asserts that eight subscribers to its Yankton, South Dakota system, who reside in the Sioux Falls MSA, contacted FEN to complain that the quality of the signal received had been diminished.[1] FEN conducted field strength measurements which confirmed the existence of excessive levels of interference to five locations in the Sioux Falls MSA. Thereafter, Johnson states that he contacted Joel A. Brick, SVRTV's Director of Telecommunications, in an attempt to determine the source of the interference. According to Petitioners, Brick stated that the Colman transmission system had been improperly connected to an omni-directional antenna, rather than to a cardioid antenna specified in SVRTV's conditional license. While Mr. Brick did not admit that the operation of SVRTV's antenna was the source of the interference, Petitioners note that Mr. Brick indicated that the correct antenna would be connected which should correct the interference problem. Thereafter, Petitioners state, the interference problems disappeared. They further state that there has been no additional interference. Petitioners contend, however, that SVRTV failed to disclose the change to an omni-directional antenna in its renewal application, pursuant to Section 21.40 of the Commission's rules, 47 C.F.R. § 21.40, and therefore the application should be denied.

4. In addition, Petitioners claim that SVRTV failed to avoid the potential for interference by its refusal to negotiate in good faith with Johnson for lease of transmitter space on SVRTV's tower.[2] Further, Petitioners state that SVRTV's unwillingness to share transmitter space on its tower with Johnson, as well as its filings of Petitions to Deny against other parties in the Sioux Falls and Colman areas, are illustrative of SVRTV's anti-competitive motives.[3]

5. *SVRTV Reply.* In response, SVRTV asserts that Petitioners claims are without merit. SVRTV states that Petitioners have not provided evidence that the transmissions from SVRTV's Colman station were the cause of interference to the eight Yankton subscribers who reside in Sioux Falls. Further, SVRTV maintains, even assuming that Petitioner's interference claim is true, that the allegation is a stale claim because the interference has been resolved. In addition, SVRTV submits that Petitioners have not established that SVRTV violated the service limitation contained in its license. "SVRTV has never offered MMDS service to any person in the Sioux Falls service area either directly or indirectly; nor has SVRTV ever derived revenue from MMDS service to the Sioux Falls market. SVRTV has at all times complied with its license restriction."[4]

6. Contrary to FEN's claims that SVRTV did not construct station WHI959 as authorized because it installed an omni-directional rather than a cardioid antenna, SVRTV maintains that it constructed the station utilizing a Bogner B8SQ cardioid, "directional" antenna, as authorized, and certified to such, in the FCC Form 494A filed with the Commission.[5] Further, SVRTV states that its renewal application for WHI959 accurately reflects operation of the facility as authorized.

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[1] FEN is the wireless cable operator which manages the Yankton system.

[2] Johnson filed an application for the E-group channels at Colman, South Dakota. His application was dismissed on December 11, 1992.

[3] SVRTV filed a Petition to Deny the modification, assignment, and renewal application of Warren Ache, licensee for the F-group channels at Sioux Falls. Ache's license was forfeited. *See* Warren Ache Application for Review (FCC 93-475, October 25, 1993). SVRTV also filed a Petition to Deny Johnson's application at Colman, SD.

[4] Opposition to Petition to Dismiss or Deny, Affidavit of Joel A. Brick at 2.

[5] FEN maintains that SVRTV operated its Colman station WHI959, with an omni-directional antenna which caused harmful interference to Yankton subscribers residing in the Sioux

7. Regarding the allegations of anti-competitive behavior, SVRTV states that it could not accommodate Johnson's request for tower space because it was under a prior legal obligation to make the tower space available to another party. Further, SVRTV states that it legitimately filed Petitions to Deny against applications which were defective.

8. *Discussion.* Section 309(d) of the Communications Act, 47 U.S.C. § 309(d)(1) provides that a petition to deny must "set forth specific allegations of fact sufficient to show... that a grant of the application would be *prima facie* inconsistent with the public interest, convenience, and necessity." 47 U.S.C. § 309(d)(1).[6] If the Commission determines that a *prima facie* case has been made, then and only then, must the Commission take the second step and determine whether a substantial and material question of fact has been presented. 47 U.S.C. §§ 309(d)(2) and (e). If the Commission finds that no substantial or material question of fact has been presented, no evidentiary hearing need be held. 47 U.S.C § 309(d)(2). The Court of Appeals for the District of Columbia Circuit has reaffirmed this two-step process for determining the sufficiency of a petition to deny. *See, e.g., Astroline Com. Co. Ltd. Partnership v. FCC*, 857 F.2d 1556, 1561 (D.C. Cir. 1988); *Gencom, Inc. v. FCC*, 832 F.2d 171, 180-181 (D.C. Cir. 1987); *Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 394 (D.C. Cir. 1985).

9. The Commission's *prima facie* inquiry is limited to consideration of the allegations in the petition to deny and any supporting affidavits. In addition, there is the assumption that the specific facts set forth by the petitioner are true. *Id.* In the instant case, a review of the specific allegations of fact, taken as true, would sufficiently establish that the grant of the subject application would be *prima facie* inconsistent with the public interest, convenience and necessity. Proof that SVRTV disregarded the service restriction imposed in its authorization would alter the Commission's public interest determination. *See e.g., Sioux Valley Empire Electric Association, Inc.*, 3 FCC Rcd at 7378.

10. Having found that the petition comports with the requirements of Section 309(d)(1), we now must determine whether a substantial and material question of fact has been raised by Petitioners.[7] In making this determination, the Commission must consider the totality of the evidence presented (i.e., the evidence offered in rebuttal, the applications and other matters the Commission may officially notice, as well as the petitioners' evidence). Moreover, the Commission may determine how much weight to accord disputed facts based on the record before it. *Astroline*, 858 F.2d at 1561; *Gencom*, 832 F.2d at 181; *Jazz*, 775 F.2d at 395. The evidence before us is sufficient for us to make an informed and reasoned decision on the merits of Petitioners' allegations without engaging in a further fact-finding process. In short, Petitioners have not raised any substantial and material questions of fact.

11. Petitioners have not adequately demonstrated that SVRTV violated the service restriction imposed in its authorization. The evidence fails to show that SVRTV provided service, directly or indirectly, or received revenue, directly or indirectly, from the provision of service within the Sioux Falls MSA. Petitioners only assert that eight subscribers to the Yankton system "complained that the quality of the signal received had been diminished."[8] While FEN claims that it confirmed the existence of excessive levels of interference, interference is not evidence of a violation of the service restriction. Petitioners present no evidence that "service" was provided to these subscribers. Thus, we find that the evidence presented does not support a finding that SVRTV violated the service restriction.

12. In addition, while Petitioners state that these subscribers were part of the Yankton system, our analysis demonstrates that these subscribers resided outside the boundaries of the Yankton station's protected service area, approximately 30-40 miles away. Therefore, as the eight Yankton subscribers fall outside the protected service area of Yankton, we find that they are not entitled to interference protection. We note that our detailed analysis in *Sioux Valley Empire Electric Association, Inc.* revealed the SVRTV's station at Colman would not cause harmful interference to the adjacent or cochannel MMDS stations in the Sioux Falls service area.[9]

13. Additionally, the interference problems noted by Petitioners occurred in December 1989, but were immediately remedied. Petitioners admit that the interference has been resolved for more than one and one-third years before its petition to deny was filed. Further, there have been no additional claims of interference filed, nor concerns raised, regarding the operation of SVRTV's WHI959. Therefore, the allegation of interference filed against SVRTV is a stale claim. Moreover, FEN has not presented persuasive evidence that the operation of SVRTV's F-group station was the source of the interference.

14. Also, Petitioners have not provided sufficient evidence to justify the claim that SVRTV engaged in anti-competitive behavior. SVRTV has sufficiently explained the reasons for its failure to co-locate with Johnson at its Colman transmitter site. Further, we do not find that the filing of petitions to deny against other applications constitutes anti-competitive conduct. In addition, the evidence presented does not persuade us that construction was inconsistent with the authorization and certification.

Falls MSA. SVRTV, however, emphasizes that a "directional" antenna is utilized on its F-group channels and argues that the operation of WHI959 was not the source of the interference. SVRTV notes that it is also authorized to operate on the H-channel at Colman with an omni-directional transmit antenna. In fact, in Mr. Brick's affidavit, he states that he received a telephone call from FEN in January, 1990 concerning interference problems. In response, Mr. Brick explained the difficulty SVRTV had experienced with the operation of the H channel antenna. However, FEN asserts that the operation of SVRTV's F-group station at Colman, not SVRTV's H-channel facility, was the source of the interference.

[6] We note that FEN, as well as Johnson satisfied the threshold requirement of Section 309(d)(1) of the Communications Act and the burden for establishing standing. *See* Lawrence N. Brandt, 3 FCC Rcd 4082 (1988).

[7] A "substantial" question for this purpose is a question which "arouses sufficient doubt on the point that further inquiry is called for." Jazz, 775 F.2d at 395.

[8] Petition to Dismiss or Deny at 4.

[9] At the time the *Sioux Valley* order was released, Edna Cornaggia's station, WLK281, was authorized to operate on the E-group channels and Warren Ache had proposed service on the F-group channels at Sioux Falls. Both Cornaggia's and Ache's licenses were subsequently forfeited.

15. *Conclusion.* Based on the foregoing, we find that Petitioner's allegations, when read in conjunction with the entire record, are insufficient to raise a substantial and material question of fact. Moreover, we are not persuaded that the record supports Petitioners' contentions that SVRTV violated Commission rules and the Sioux Falls service restriction.

16. *Ordering Clause.* Accordingly, IT IS ORDERED that the Petition to Deny the above-referenced renewal MMDS application of Sioux Valley Rural Television, Inc filed by Family Entertainment Network, Inc. and Kevin Johnson, IS DENIED.

17. This order is issued pursuant to Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, and is effective on its release date. Petitions for reconsideration pursuant to Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, or applications for review pursuant to Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, may be filed within thirty (30) days of the date of public notice of this order. See Section 1.4(b)(2) of the Commission's Rules, 47 C.F.R. § 1.4(b)(2).

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-122

In re Application of

CALVARY EDUCATIONAL BROADCASTING NETWORK, INC. File No. BRED-891103UA

For Renewal of License
of Station KOKS(FM)
Poplar Bluff, Missouri

MEMORANDUM OPINION AND ORDER

Adopted: January 24, 1994; Released: February 3, 1994

By the Review Board: MARINO (Chairman), BLUMENTHAL and GREENE.

1. The Board has before it the *Initial Decision*, 8 FCC Rcd 4789 (1993)(*I.D.*), of Chief Administrative Law Judge Joseph Stirmer (ALJ). It also has before it the exceptions to the *I.D.* filed by the Commission's Mass Media Bureau. In brief, the *I.D.* granted a short-term (1-year) renewal to the above-captioned noncommercial FM station and assessed a $10,000 forfeiture against the licensee (Calvary) for multiple violations of 47 CFR § 73.318 (FM blanketing interference rules).[1]

BACKGROUND

2. Calvary applied for its construction permit in March 1987. Essentially a "mom and pop" venture consisting of Mr. and Mrs. Donald Stewart, KOKS-FM (including the transmitter tower) was constructed on land at their personal residence. No sooner had the station commenced broadcasting under FCC Program Test Authority on October 6, 1988 than complaints of signal interference to other television and radio channels were lodged by residents whose homes were located in the vicinity of the new station.[2] Section 73.318(b) of the Commission's Rules provides, however (emphasis added):

> After January 1, 1985, permittees or licensees who either (1) commence program tests, or (2) replace their antennas, or (3) request facilities modifications and are issued a new construction permit *must satisfy all complaints of blanketing interference which are received by the station during a one year period.* The period begins with the commencement of program tests, or commencement of programming utilizing the new antenna. *Resolution of complaints shall be at no cost to the complainant.* These requirements specifically do not include interference complaints resulting from malfunctioning or mistuned receivers, improperly installed antenna systems, or the use of high gain antennas or antenna booster amplifiers. Mobile receivers and non-RF devices such as tape recorders or hi-fi amplifiers (phonographs) are also excluded.

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[1] Because of unresolved FM blanketing interference complaints and the licensee's responses to those complainants and to the FCC, the licensee's renewal application was designated for hearing on the following issues:

> 1. To determine whether Calvary Educational Broadcasting Network, Inc. violated Section 73.318 of [the] Commission's Rules, 47 CFR Section 73.318 (FM blanketing interference), and, if so, the nature and extent of this violation;
>
> 2. To determine whether Calvary has misrepresented facts or lacked candor in its statements to the Commission regarding the extent and success of its efforts to correct the blanketing interference problems;
>
> 3. To determine whether the licensee's management and operation of Station KOKS was so negligent, careless, or inept, or evidenced such disregard for the Commission's rules, that it cannot be relied upon to fulfill the responsibilities imposed upon it;
>
> 4. To determine, the light of the evidence adduced pursuant to the preceding issues, whether or not grant of the subject license renewal application would serve the public interest, convenience and necessity.

Hearing Designation Order, 7 FCC Rcd 4037 (1992).

[2] The *I.D.* (at para. 12) reports:

> Before KOKS began broadcasting, residents of the area near the KOKS tower generally were able to watch WPSD-TV, Channel 6, Paducah, Kentucky; KAIT-TV, Channel 8, Jonesboro, Arkansas; KFVS-TV, Channel 12, Cape Girardeau, Missouri; and KPOB-TV, Channel 15, Poplar Bluff (MMB Ex. 2, p.1; MMB Ex. 3, pp. 1-2; MMB Ex. 4, p.2). Residents were also able to listen to a number of FM radio stations, including KJEZ and KKLR. Shortly after KOKS went on the air on October 6, 1988, Calvary began to receive telephone calls from persons complaining that KOKS was causing interference to their reception of television and radio. Among the persons who called the station to complain were Doris Smith, Irma Jean Hillis (hereinafter Jean Hillis), Dairel L. Denton, Jr., Clyde Freeman, Joanne Gray, Randy Soens, and Marie Christian. (Tr. 409; Calvary Ex. 3, p.3; MMB Ex. 3, p.3; MMB Ex. 4, p.3; MMB Ex. 6, p.3; MMB Ex. 7, p.3.) Many residents complained about severe KOKS interference to reception of Channel 6. Moreover, many of those persons were no longer able to watch Channel 8. Complainants also alleged to a lesser extent that KOKS was interfering with reception of Channels 12 and 15 and with reception of FM radio. (Tr. 409, 907, 977, 993; MMB Ex. 2, p.2; MMB Ex. 3, pp.2-3; MMB Ex. 4, p.2; MMB Ex. 5, p.2; MMB Ex. 6, p.2; MMB Ex. 7, p.2; MMB Ex. 8, p.2; MMB Ex. 9, p.2; MMB Ex. 10, p.2; MMB Ex. 17, pp.11-29, 33-37, 40-42, 46-48, 54; MMB Ex. 19, pp. 6-37, 59-68, 71.)

3. But, as the ALJ noted, the Stewarts -- theretofore farmers in the "egg-laying" business -- had no prior broadcast experience and:

> [w]hen complaints about KOKS interference began, Calvary's principals did not know what to do and no provisions, either with respect to money or personnel for dealing with blanketing interference complaints, had been made. No one at Calvary had any prior experience resolving such complaints. Calvary did not even know what its obligations were, because it did not possess a copy of the Commission's Rules. (Tr. 365, 393, 406, 413, 428, 723, 726, 731.)

I.D. at para. 13. Nearby neighbors allegedly receiving interference to preexisting television and radio signals initiated a petition campaign, and referred more than 150 signed complaint forms to the FCC's Kansas City Field Office in late 1988. *See id.*, para. 15. In turn, the Field Office referred the complaints back to KOKS, along with instructional materials (including specifically described filters and installation diagrams) to assist the licensee in resolving the interference complaints. *See* Bureau Exceptions at 5.

4. Without repeating all of the findings of fact further detailed by the ALJ in paras. 19-86 of the *I.D.*, findings unchallenged by either party, we summarize the ensuing history as follows. Obviously without the financial or technical resources to fully respond to the interference complaints that ultimately numbered more than 200 from residents living within 2.5 miles of the new FM radio station, Calvary did make some "limited" efforts to resolve the complaints. The Stewarts themselves, often accompanied by local TV repair shop owner and KOKS contract engineer Charles Lamp, personally visited almost every complainant. In part because of a misunderstanding of the obligations of § 73.318 and in part because of "economical reasons," *see I.D.* at para. 104, the licensee has never been (and is not yet) in compliance with § 73.318. There is also no doubt upon this record that many of the interference complaints were not resolved because the licensee, in disregard of the technical advice provided by the Kansas City Field Office, (1) continued to respond to interference complaints with inexpensive and ineffective filters (*see, e.g., I.D.* paras. 26, 38); and (2) limited the installation of filters to only one TV set per complaining household for lack of adequate resources. *Id.*, paras. 62-63.[3]

5. By way of further explanation, however, the record also reflects some of the difficulties (and, perhaps, mitigating circumstances) that confronted the licensee in coming into "strict" compliance with § 73.318. First, whereas the rule calls upon a permittee (or licensee,)[4] to "satisfy all complaints of blanketing interference," it appears that several of the Stewarts' neighbors may be all but impossible to "satisfy" since they have objected to the station from the outset primarily on aesthetic grounds. *See I.D.*, para. 10 (complaints of neighbors Doris Smith and Irma Jean Hill). Moreover, as will be discussed further hereinbelow, there are extrinsic conditions that may well work against strict compliance in the current case, if § 73.318(b) is interpreted literally.

6. In that regard, a second complicating factor is that, although as many of 60% of the complaints against KOKS concerned alleged interference to the local, off-the-air reception of WPSD-TV, Channel 6, Paducah, Kentucky, the licensee was advised by its counsel as well as an FCC Field Office official that KOKS had no duty to alleviate interference to local reception on Channel 6, since the interference was beyond the Grade B signal contour of that distant Kentucky television station. In fact, an April 27, 1990 letter from the Commission to KOKS advised that the FCC had made "no final determination in this [KOKS] case concerning the types of service interruptions that fall within the ambit of the Commission's rules, 47 CFR 73.318." *I.D.* at para. 108 (quoting FCC letter). In further fact, unchallenged by the Bureau, are the assertions of the licensee and the ALJ that the belated policy determination that Calvary *did* have a duty to correct interference caused to reception of the Paducah, Kentucky television signal (beyond that distant TV station's Grade B contour) was promulgated for the first time in the 1992 *Hearing Designation Order* commencing this very case. *See I.D.*, para. 108; Calvary Reply at 4-5.[5]

7. Besides the Bureau's three-and-a-half year indecision on the applicability of § 73.318 to Paducah's TV Channel 6, the ALJ reports that in December 1989 FCC Field Office personnel visited the homes of various KOSK complainants. *See I.D.*, paras. 49-53. The FCC's field engineer, Michael Moffet, found that while in some homes the interference to various television and radio channels was reduced somewhat when KOKS was *not* transmitting, (1) off-the-air reception of television channels other than Channel 6 (*i.e.*, Channels 8, 12, 15 and 39) was mediocre to poor in general; (2) "there are additional reasons [unrelated to KOKS] for poor television reception" in the relevant locale; and (3) interference to FM radio reception "was not a major concern of the complainants."[6]

8. In any event, by letter of October 30, 1990 the Bureau's Audio Services Division issued an *Order* requiring KOKS to "restore service" to as many as 220 unsatisfied

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[3] Indeed, the licensee has made no effort whatever to come into compliance since the 1992 issuance of the *Hearing Designation Order*, because it is "unreasonable to expect the station to undertake an expensive and extensive effort ... while engaging in a renewal hearing." *I.D.* at n.20.

[4] Although the agency was aware of the numerous 1988 complaints of blanketing interference outstanding against KOKS while the station held a mere construction permit, it nonetheless granted Calvary's (September 6, 1988) application for a full broadcast license on January 4, 1989.

[5] Because the Bureau declined to determine, or advise Calvary, that § 73.318 applied to interference to the distant Paducah TV Channel 6, the ALJ concluded that "KOKS cannot be faulted for its [prior] failure to correct blanketing problems affecting Channel 6." *I.D.* at para. 108. We agree. *See Maxcell Telecom Plus, Inc. v. FCC*, 815 F.2d 1551, 1558 (D.C. Cir. 1987)(regulatee entitled to adequate notice of duties).

[6] FCC Kansas City field engineers made a second visit to 14 Poplar Bluff complainants. Their report also concluded (1) "the complainants were attempting to receive stations that were 68-86 miles distant and separated by up to 174 degrees, resulting in a very low signal reaching the television receiver to begin with"; (2) that many of the KOKS-supplied filters appeared to stop working a few weeks after installation; *but* that (3) "the installation of filters, coax cable and other equipment leads to a *loss* in the signal reaching the television set... ." *I.D.* at para. 68 (emphasis added). Although this second pair of FCC engineers likewise found generally poor off-the-air television reception even when KOKS was *not* broadcasting, and could not at other

complainants within 120 days of its *Order* and to submit progress reports every 30 days. *I.D.*, para. 57. In response, Calvary sent a questionnaire to many complainants inquiring as to which channels were experiencing interference, *id.*, para. 58, but the licensee sent no questionnaire to complainants whose problems the licensee had reported as previously cured. *Id.*, para. 59. As indicated earlier, Calvary's principals then visited almost all of the 105 homes it regarded as having unresolved interference complaints, and attempted to satisfy the complainants with a "limited" number of inexpensive and ineffective filters. Calvary also advised some complainants that the complainants themselves were required to buy the recommended filters. *See id.*, paras. 62-63. It then reported back to the FCC in February 1991 as follows:

> Calvary stated that the Microwave filter it had used and installed, the FAS-Trap 5K FM-89.5, eliminated FM blanketing interference caused by KOKS. Calvary also claimed that it went beyond the Commission's requirements by eliminating FM blanketing interference to Channel 6. Finally, Calvary stated that the average cost per home visit was $65.00. The reports were silent as to the number of television sets per residence it had serviced and as to whether any filters had been installed on complainants' radios. (MMB Ex. 26, p.1; MMB Ex. 27, p.1).

I.D. at para. 64. However, (*id.*, at para. 65):

> The reports submitted to the Commission by Calvary were furnished to some of the complainants and Smith, Jean Hillis, Beckham, and Fred and Marie Ellis, among others, specifically disputed Calvary's claims that their service had been restored. (MMB Ex. 2, pp. 27-28; MMB Ex. 3, pp. 4-5; MMB Ex. 9, pp. 6-7; MMB Ex. 30, pp. 5-6.) In addition, Sandra Durbin, Clara Freeman, Joanne Gray, Mary Wynn, and Leatha Piper pointed out that their complaints had not even been addressed by Calvary during the licensee's 1991 visits to restore service. (MMB Ex. 5, pp. 14-15; MMB Ex. 6, pp. 8-9; MMB Ex. 7, pp. 14-15; MMB Ex. 10, pp. 18-19; MMB Ex. 29, pp. 9-10). Finally, Marie Christian complained that, although she had three television sets, Calvary installed a filter on only one set. (MMB Ex. 1, p. 49.) Except with respect to Wynn, Calvary does not appear to have responded to the complaints noted above or that it attempted any further repairs. (Tr. 536-537.)

9. Because of Calvary's failure to fully comply with § 73.318 and because it believes that the licensee's responses to the FCC regarding the alleged "satisfaction" of a number of individual interference complaints amounted to misrepresentations or lack of candor to the Commission, the Bureau here argues that the ALJ erred in granting even a short-term renewal of the license of KOKS. Whereas the ALJ found no deliberate deceit on the part of Calvary, *see I.D.*, para. 116, the Bureau asserts numerous instances where the licensee either inaccurately reported to the FCC that it had satisfied a particular interference complaint or failed to correct such reports once advised that the complainant remained unsatisfied. *See* Bureau Exceptions at 8-19. In response, Calvary submits that the Bureau overlooks the mitigating evidence and that most (if not all) of the disputes over "restoration" of service reports to the FCC centered on the licensee's (previously undetermined) duties as to Channel 6 television reception.

DISCUSSION

10. At the outset, we make three controlling points: *first*, irrespective of the "mitigating evidence," this Board has no alternative but to find upon this record that KOKS has not fully complied with the literal requirements of § 73.318; *second*, insofar as the (belated) determination that KOKS *is* required to "satisfy" complaints of interference to television Channel 6, this Board is squarely bound by the determination as set forth in the *Hearing Designation Order*;[7] and, *third*, the financial inability of a licensee to comply with Commission rules is an unacceptable defense for noncompliance. *See United Television Co.*, 40 FCC 2d 472 (1973)(subsequent history of license loss omitted); *accord KQED, Inc.*, 57 FCC 2d 264, 269 (1975)(subsequent history omitted).[8]

11. Given those three operative principles, and even assuming *for instant purposes only* that the ALJ's conclusions on the misrepresentation and candor issues are entitled to affirmation,[9] the Board must agree with the Bureau that -- upon this record -- "there is no indication that Calvary will comply with the rule [§ 73.318] if given another opportunity,"[10] at least insofar as the Bureau regards compliance. Unless and until Calvary demonstrates that it is technically and financially qualified (*see* 47 U.S.C. § 308(b)),[11] the Board sees little purpose in granting a renewal, hence risking the perpetuation of continued noncompliance and yet further enforcement proceedings initiated by an obviously unsatisfied Mass Media Bureau.

12. Thus, without denying the considerable difficulties involved in achieving strict compliance with § 73.318 -- as reflected clearly in the reports of the Commission's Kansas

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times determine whether the perceived interference (*viz.*, "snowy" pictures) was KOKS-related, the field engineers reported that Calvary had failed to "restore" television and/or FM radio service to a number of complainants. *See id.*, at paras. 69-84.

[7] *Atlantic Broadcasting Co.*, 5 FCC 2d 717, 721 (1966)(Board bound by Hearing Designation Orders).

[8] Although the cited decision ordered the licensee to come into compliance by resuming broadcasting on noncommercial television station KQEC-TV within 90 days, upon reconsideration the licensee was permitted an additional 9 months to comply because of "financial strain" on the licensee. *KQED, Inc.*, 58 FCC 2d 751, 752 (1976).

[9] An ALJ's credibility findings are entitled to great weight, *see, e.g., WHW Enterprises, Inc. v. FCC*, 753 F.2d 1132, 1142 (D.C. Cir. 1985).

[10] Bureau Exceptions at i.

[11] The Board recognizes that no financial issue was designated against Calvary. However, the record here, and the ALJ's findings based thereon, ineluctably raise substantial and material questions as to Calvary's financial ability to operate in compliance with FCC technical rules. Again, financial hardship is an unacceptable basis for continued noncompliance. Compliance must precede renewal. *United Television Co.; KQED, Inc.*

City FOB engineers -- the Board is constrained to require from the licensee (1) a written showing of the measures it proposes to take to come into full compliance with § 73.318, including a detailed time schedule of proposed actions; and (2) a written showing of the licensee's finances sufficient to demonstrate that it possesses the resources necessary to achieve full compliance with § 73.318. These two written showings shall be filed with the Board no later than twenty (20) days from the public release of this *Memorandum Opinion and Order*. The Bureau shall then be provided fifteen (15) days to reply to, or comment upon, the licensee's showings. Upon review of these materials, the Board will take whatever action on the license renewal application it regards as appropriate.[12]

13. ACCORDINGLY, IT IS ORDERED, That Calvary Educational Broadcasting Network, Inc. SHALL FILE within twenty (20) days of the release of this *Memorandum Opinion and Order* the written documentation specified in paragraph 12 above; and That the Mass Media Bureau MAY FILE comments within fifteen (15) days thereafter.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

[12] Nothing, of course, precludes meetings on these matters between the licensee and the Bureau, or the possibility of a negotiated resolution of this proceeding, should the parties desire to enter a mutually satisfactory consent agreement.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI TELECOMMUNICATIONS CORPORATION, WESTERN UNION INTERNATIONAL, INC., and TELECOM*USA, INC.,
Complainants,

v.

Central Telephone Company of Ohio,
Defendant.

File No. E-93-136

ORDER

Adopted: January 25, 1994; Released: February 3, 1994

By the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On September 30, 1993, MCI Telecommunications Corporation, Western Union International, Inc., and Telecom*USA, Inc. ("Plaintiffs") filed the above-captioned complaint against Central Telephone Company of Ohio ("Defendant") seeking damages resulting from the Defendant's alleged violations of the Commission's rate of return prescription for the period January 1, 1989 through December 31, 1990. On December 21, 1993, however, Plaintiffs and Century Telephone of Ohio, Inc., successor in interest to the Defendant, filed a joint motion to dismiss the complaint stating that they had settled all claims against Defendant in this proceeding and requesting that the complaint be dismissed with prejudice.

2. We are satisfied that dismissal of the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated in Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the parties' Joint Motion to Dismiss IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE and the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and Investigations Branch
Enforcement Division
Common Carrier Bureau

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: January 25, 1994

REQUEST BY WAVEPHORE, INC. FOR A CLARIFICATION OF THE TELEVISION RULES TO ALLOW DIGITAL DATA TRANSMISSION WITHIN THE VIDEO PORTION OF TELEVISION STATION TRANSMISSIONS:

COMMENT DATE: March 14, 1994
REPLY DATE: March 29, 1994

WavePhore, Inc. requests a clarification that television broadcast licensees may, without prior Commission authorization, use WavePhore's "TVT1" system to transmit digital data signals within the visual pass-band of television station transmissions. The system transmits digital data within an NTSC television signal, between 3.9 MHz and 4.2 MHz within the standard 6 MHz channel, at an amplitude close to the video noise floor. The request states that the "TVT1" system now transmits data at a rate of 384 Kbps, and may soon be able to send data at a rate of 1.544 Mbps. WavePhore, Inc. asserts that its system generates no out-of-band spectral components.

According to the request, the system causes no visual degradation of the television picture, as viewed on any commercial television set, because: (1) all commercial television tuners filter out that part of the spectrum that contains the data; (2) the amplitude of the data transmission is only several IRE units above the video noise floor and is therefore almost impossible to discern; (3) the data is injected into a narrow 300 kHz band that adds no significant component to the video noise when integrated and weighted over a 4 MHz bandwidth; and (4) the data subcarrier's exact frequency and phase result in a "picket fence" data spectrum that is interleaved with respect to the comb structure of the chroma and lumina spectrum.

Copies of the request, and comments when filed, may be inspected and copied at the FCC Reference Center, Room 239, 1919 M Street, NW, Washington, DC 20554. Copies may also be purchased from the Commission's copy contractor, ITS, Inc., Room 246, 1919 M Street, NW, Washington, DC (202) 857-3800.

Interested parties are invited to submit comments addressing the assumptions, experimental data, and conclusions set forth in the request. Commenters are also asked to address whether any combination of intrachannel data transmission systems may cause undue interference to television broadcast signals.

For further information, contact David O. Bennett at (202) 632-6495.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

COAST TV — **MM Docket No. 84-934**
File No. BPCT-840720KG

MISSION BROADCASTING CORPORATION, — **MM Docket No. 84-935**
File No. BPCT-840723KI

SOLAR TELEVISION — **MM Docket No. 84-936**
File No. BPCT-840723KJ

For a TV Construction Permit
in Santa Barbara, California

Appearances

Donald Ward, *Esq.* on behalf of Coast TV; *Michael Bader, Esq.* and *Melodie A. Virtue, Esq.* on behalf of Mission Broadcasting Corporation; *Michael Couzens, Esq.* on behalf of Solar Television; and *Paulette Laden, Esq.* on behalf of the Mass Media Bureau.

SUPPLEMENTAL INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE EDWARD LUTON

Issued: January 26, 1994; Released: February 4, 1994

I. BACKGROUND

1. On September 22, 1992, the Commission's Review Board remanded this proceeding (*Coast TV*, 7 FCC Rcd. 6244) for consideration of the following issues:

> 1. To determine whether Mission Broadcasting Corporation is financially qualified to be a Commission licensee.
>
> 2. To determine whether Mission Broadcasting Corporation falsely certified its financial qualifications and, if so, the effect thereof on its qualifications to be a Commission licensee.

2. In remanding the proceeding, the Review Board stated that "Mission places sole reliance" for its financial qualifications upon an August 31, 1984 letter from the Crocker National Bank to Mission's counsel. That letter is as follows:

> Dear Mr. Thompson:
>
> The Crocker Bank (the Bank) could provide $2,000,000 in loans to Mission Broadcasting Corporation (The Corporation) for the purpose of constructing a television station in Santa Barbara, California.
>
> Subject to the foregoing, our willingness to lend this amount to the Corporation would be contingent upon the following and not limited to:
>
> 1. The Corporation successfully obtains approval from the Federal Communications Commission (FCC) to construct and operate such television station in the Santa Barbara area.
>
> 2. (a) All reasonable and ordinary credit criteria of the Bank are met by the Corporation. (b) the Corporation receives a construction permit. (c) the Corporation requests a lending commitment from the Bank. (d) the Corporation executes all customary documentation normally required by the Bank for credits of this type, including opinions of attorneys and accountants, and guarantors and collateral documents acceptable to the bank.
>
> Cordially yours,
>
> Crocker National Bank
>
> Patrick T. Caswell
>
> Associate Account Manager

3. The Review Board said that, "On its face, this letter raises substantial and material questions as to the validity and substance of the applicant's financial proposal at the time of certification. *Aspen FM*, 6 FCC Rcd/602 (1991); *Northhampton Media Associates*, 4 FCC Rcd 5517, 5518 (1989)." More particularly, "... the letter... appears woefully deficient in that it does not specifically identif[y]' most of the significant terms including interest rate, terms of repayment and collateral requirements." Additionally, "the letter (which is not addressed to the applicant, but to its counsel) does not indicate either that any longstanding relationship exists between borrower and lender, or that the applicant has provided sufficient information about itself which the bank has reviewed to its satisfaction so as to provide reasonable assurance that the loan will be forthcoming." It was left open to Mission to show any understandings "between the lender and applicant here to overcome the apparent deficiencies on the face of the availability letter."

II. FINDINGS OF FACT

4. Mr. Floyd D. Little is Mission's president. Mr. John Adams was the branch manager of the Santa Barbara Business Banking Branch of Crocker National Bank during the time that Mission was seeking reasonable assurance of a loan. Mr. Patrick D. Caswell was employed in the bank's commercial loan department, involved in "'midmarket' deals, those involving loans of $500,000 and up." Mission Ex. S-2.

5. Mr. Little met Mr. Adams in Adam's office to discuss the proposed television project. Mission Ex. S-1. Little recalls that Adams was "very enthusiastic," telling Little that it would be good business for the bank to have a local television station as a client. Mr. Adams took Little to Mr. Caswell's office at the bank and made the introductions. Adams stayed 5-10 minutes while the three of them talked, and then Adams left. Tr. 3016-17.

6. During his time with Mr. Caswell, Mr. Little told Caswell about the available television channel (Tr.3021), and told Caswell that the station would be owned by local investors (Tr. 3022). Little does not recall whether he was asked by Caswell to identify the local investors, and Little

cannot remember whether he mentioned any of their names (Tr. 3022-23). Little did not seek to learn what the bank's credit criteria may have been (Tr. 3024); nor did Mr. Caswell tell Mr. Little specifically what the bank might need in order to extend credit (Tr. 3024). Little informed Caswell that the estimated costs for the construction and operation of the television station were "close to $2 million." Tr. 3026. Mr. Little's whole purpose was to ascertain that, "should we win the license or the CP, and we complied with the credit criteria, ...|the bank| would loan Mission $2 million." Tr. 3024 He told Mr. Caswell that Mission did not need a legally binding commitment, but it did need "what the FCC called reasonable assurance' of a future $2,000,000 loan." Mission Ex. S-1. Little also told Caswell that a confirming letter would be needed, and that Mission's counsel would speak to him about the details of that letter. Tr. 3039. Mission Ex. S-2.

7. Mr. Caswell was aware that Mr. Little had been one of the bank's good customers for several years, that Little's Lincoln-Mercury dealership had done substantial business with the bank and that Mr. Little had a good credit history. Mission Ex. S-2. Mr. Caswell believes that he and Mr. Adams gave Little "every reason to believe that we would get a satisfactory letter for Mission." Mr. Little left the bank believing that he had received a $2 million dollar loan commitment and that he would receive a confirming letter from the bank. Tr. 3094; Mission Ex. S-2. Thus, Mission's claim of reasonable assurance is based upon an oral commitment it received in a meeting of Messrs. Little, Adams and Caswell.

8. Mr. Little testified that this meeting occurred sometime prior to July 18, 1984, the date on which Little signed Mission's application and thereby certified the applicant's financial qualifications. Little is sure the meeting occurred prior to July 18, 1984 because he knew Mission had to get a loan commitment before he could properly sign Mission's application. Tr. 3100.

9. The minutes of Mission's Board of Directors meeting held August 7, 1984, contain the following:

> "5. Loan commitment. Floyd Little has contacted Crocker Bank for the purpose of securing a 'letter of intent' from the bank to loan the corporation |$2,000,000|." Solar Ex. S-1.

The minutes of the next Mission Board of Directors meeting, held August 14, 1984, contain the following:

> "4. Floyd Little reported that he had secured a loan commitment from Crocker National Bank." Mission Ex. S-4.

10. On August 23, 1984, Mission's counsel, Mr. Robert L. Thompson, wrote to Mr. Caswell at the bank, requesting that he be provided with a "letter of intent" for Mission, and enclosing "sample copies of two bank letters that we have used in other cases." Mission Ex. S-3, Att. 1; Coast Ex. S-2. On August 28, 1984, Mr. Caswell responded to Mr. Thompson with the following letter:

> RE: Mission Broadcasting Corp.
>
> Dear Mr. Thompson:
>
> Mr. Floyd Little has been a valued customer of the Crocker Bank, Santa Barbara, California, since 1982. All personal as well as business accounts have been maintained in a satisfactory manner.
>
> The Crocker Bank would be willing to entertain future credit requests that Mr. Little may have.
>
> Cordially yours,
>
> Crocker National Bank
>
> Patrick T. Caswell
>
> Associate Account Manager

Coast Ex. S-3.

According to Mr. Little, this letter was rejected by Mission's counsel because it was "too vague." Tr. 3041. Little testified that he felt no urgency about obtaining a satisfactory letter because the letter itself was not the basis for certifying Mission's financial qualifications. Tr. 3050-51; 3058-59. Little testified that his certification of the application "was based on a commitment from Mr. Caswell and Mr. Adams that should we win the CP and we fulfilled the credit criteria, the bank would loan Mission $2 million." Tr. 3059.

11. The bank issued a letter satisfactory to Mission on August 31, 1984. The letter is addressed to Mission's counsel because counsel requested that it be addressed that way. Mission Ex. S-2. The August 31, 1984 letter is as follows:

> Dear Mr. Thompson:
>
> The Crocker Bank (the Bank) could provide $2,000,000 in loans to Mission Broadcasting Corporation (The Corporation) for the purpose of constructing a television station in Santa Barbara, California.
>
> Subject to the foregoing, our willingness to lend this amount to the Corporation would be contingent upon the following and not limited to:
>
> 1. The Corporation successfully obtains approval from the Federal Communications Commission (FCC) to construct and operate such television station in the Santa Barbara area.
>
> 2. (a) All reasonable and ordinary credit criteria of the Bank are met by the Corporation, (b) the Corporation receives a construction permit, (c) the Corporation requests a lending commitment from the Bank, (d) the Corporation executes all customary documentation normally required by the Bank for credits of this type, including opinions of attorneys and accountants, and guarantors and collateral documents acceptable to the bank.
>
> Cordially yours,
>
> Crocker National Bank
>
> Patrick T. Caswell
>
> Associate Account Manager

Because the contemplated loan involved a large amount of money, Mr. Caswell involved his regional supervisors and the bank's lawyers in the preparation of the August 31, 1984 letter. Tr. 3135-36; 3161-62.

12. Mr. Caswell testified that it was his intention to have the August 31, 1984 letter reflect that the bank was "willing" to make a $2 million loan to Mission. Tr. 3130. He also testified that, because Mission "was not at that time applying for a $2 million loan or making any formal loan request, there was no need to make a more detailed commitment than the letter that we issued." Mission Ex. 2. Mr. Caswell opined that, "To have stated an interest rate and specific repayment/collateral terms in Mission's letter would not only have made no practical sense where no loan request was pending but, in any event, would have possibly subjected the Bank to a binding obligation to make the loan at some unknown time in the future." He said that the bank could not go that far. Caswell testified that his August 31, 1984 letter "was intended, as Mr. Little had requested, to assist Mission in meeting the FCC financial qualifications standard but not to be legally binding on the bank."

III. CONCLUSIONS OF LAW

13. Mission claims that it received oral assurance of a $2 million loan from the Crocker Bank during a meeting at the bank involving Mr. Little, Mr. Caswell, and Mr. Adams. According to Mr. Little, this meeting occurred sometime *before* July 18, 1984, the date on which Little signed Mission's application and thereby certified the applicant's financial qualification. Little is certain that the meeting occurred prior to July 18, 1984 because he knew that a loan commitment had to be obtained before he could properly sign Mission's application.

14. No witness testimony contradicts Little's claim that the meeting took place prior to July 18, 1984; however, certain documentary evidence could suggest a different conclusion: 1) Mission's minutes of its first organizational meeting, July 16, 1984, contain no mention of any actual or planned effort to secure bank financing (Solar Ex. B); 2) the minutes of Mission's board of director's meeting, August 7, 1984, say that Little "has contacted" the bank for the purpose of securing a loan commitment; and 3) the minutes of the next board meeting, August 14, 1984, say that Little "has secured" a bank commitment. The inference, stressed particularly by Coast TV, is that if Little had secured bank financing, i.e., a commitment, by July 18 as he says he did, that significant fact would likely have been reflected in the August 7 minutes:

> "... Mission's own Board of Directors' minutes of August 7 and August 14, 1984, neatly bracket Mission's receipt of such assurance: Those of August 7 record that Floyd Little has contacted Crocker Bank for the purpose of securing a [loan commitment] from the bank;" and the August 14 minutes record the fact that 'Floyd Little reported that he has secured a loan commitment from Crocker National Bank.' Surely, if Little had secured such a commitment on or before July 18, as Mission claims, that fact would have been reported in the minutes of the *first* Board meeting after July 18, rather than in those of the *second* such meeting. Coupled with the apparent silence of the July 16 minutes on the subject of potential bank financing... it must be concluded that Little's initial contact with the Crocker Bank occurred between July 16 and August 7, and that he received oral assurance that the Bank would issue Mission a letter confirming their discussions concerning a loan between August 7 and August 14."

Coast TV's conviction about what *would* have happened ("Surely, if Little had secured such a commitment" when he said he did, "that fact would have been reported" in the August 7 minutes) is mere guesswork and speculation, unsupported by any evidence of record. Coast TV's argument is insufficient to overcome the uncontradicted testimony of Mr. Little that his discussion with Mr. Adams and Mr. Caswell occurred sometime prior to July 18, 1984.

15. If the Crocker Bank did make a commitment prior to July 18, 1984, the evidence suggests the commitment was made to Mr. Little personally, and only incidentally to Mission Broadcasting Corporation. Little's purpose in going to the bank was to ascertain that, "should we win the license or the CP, and we complied with the credit criteria...[the bank] would loan Mission $2 million." Thus, Little's interest was in obtaining financial assurance for Mission, not for himself personally. But the bank's interest was focussed more specifically on Mr. Little personally than on the entity Mission Broadcasting Corporation. According to Mr. Caswell, the bank's assessment was primarily of Mr. Little (not Mission) and his reputation and business standing with the bank, which caused the bank to want to help Little with the project in which he was involved. Tr. 3133-4. That is not surprising because the evidence is that Little mentioned none of the names of the other Mission principals, informing Mr. Adams (and, presumably, Mr. Caswell, too) only that the principals were "local people." And while Mr. Adams may have expressed enthusiasm at the prospect of the Crocker Bank having a local television station as a client, he appears to have made no inquiry of Little about the composition of this desired bank client.

16. The bank's focus at least as late as August 28, 1984 is shown by Coast Ex. S-3. That exhibit consists of Mr. Caswell's initial response to Mr. Little's request for a "confirming letter":

> RE: Mission Broadcasting Corp.
>
> Dear Mr. Thompson:
>
> Mr. Floyd Little has been a valued customer of the Crocker Bank, Santa Barbara, California, since 1982. All personal as well as business accounts have been maintained in a satisfactory manner.
>
> The Crocker Bank would be willing to entertain future credit requests that Mr. Little may have.
>
> Cordially yours,
>
> CROCKER NATIONAL BANK
>
> Patrick T. Caswell
>
> Associate Account Manager

Indicative of the care and seriousness with which he viewed the matter, Mr. Caswell involved his regional supervisors and the bank's lawyers in the preparation of this

letter. Tr. 3135. That care and seriousness resulted in a letter directed to and primarily concerned with Mr. Floyd Little.

17. Mr. Caswell testified that the August 28, 1984 letter represented the bank's attempt "to be as vague as possible." Tr. 3137. He said that the nature of bankers "is to cover the bottoms very carefully... [so that] the first time in many cases you shoot out the vaguest [letter possible] and, you know, that's what we did here. Tr. 3137. Mission's counsel rejected the letter as "too vague." Tr. 3040; Coast Ex. S-1.

18. Mr. Caswell claims that at their meeting, he and Mr. Adams gave Mr. Little "every reason to believe that we would get a satisfactory letter for Mission." Even so, Caswell's first effort in that regard is somewhat puzzling: the issuance of his carefully drafted letter of August 28, 1984, concerned in its substance exclusively with Mr. Little personally, and with only a bare, unexplicated reference to the would-be-borrower, Mission Broadcasting Corporation. As Coast TV points out, the expression in the letter of the bank's willingness to entertain future credit requests from *Mr Little* suggests the absence of a meeting of the minds as to the bank's willingness to lend to *Mission*.

19. Mission claims that its affirmative financial certification is based on an oral commitment it received from the Crocker Bank. Mission argues that the "terms" of this commitment "were confirmed by the Bank's August 31, 1984 letter to Mission signed by Mr. Caswell." That letter, by its terms, is concerned with the would-be borrower Mission Broadcasting Corporation. As with the August 28, 1984 letter, Mr. Caswell involved his supervisors and the bank's lawyers in the preparation of this letter as well.

20. In *Scioto Broadcasters Limited Partnership*, 5 FCC Rcd. 5158; 5160 (Rev. Bd. 1990) the Review Board stated that the test for having reasonable assurance of committed sources of funds from a lending institution consists of the following alternative factors:

> 1. the bank has a long and established relationship with the borrower sufficient to infer that the lender is thoroughly familiar with the borrower's assets, credit history, current business plan, and similar data; or
>
> 2. the prospective borrower has provided the bank with such data, and the bank is sufficiently satisfied with this financial information

21. Mission asserts that the August 31, 1984 letter "establishes that the Bank's pre-certification loan commitment was consistent with at least the first of the two 'alternate' criteria enumerated in" *Scioto, supra*. According to Mission, that case established as the first factor of a two-part test whether a lending bank has a long and established relationship with an applicant's *principal*. Mission goes on to argue that Mission's principal Mr. Little "was hardly 'a virtual stranger' to Crocker Bank", and the bank was "favorably acquainted" with Mr. Little. The first factor of the two-part *Scioto* test, however, is more accurately stated this way: whether the bank has an established relationship with the prospective borrower such that the bank is favorably acquainted with the borrower and the proposed project. The "prospective borrower" was Mission Broadcasting Corporation, not Floyd Little. The bank's favorable disposition toward Mr. Little cannot logically be transformed into a favorable disposition toward Mission Broadcasting Corporation, whose make-up and shareholder identities were, as the evidence shows, mostly unknown to the bank.

22. The Review Board also stated the following in *Scioto, supra*:

> "... central to any reasonable assurance' showing of a loan from a financial institution is that the individual qualifications' of the borrower have been preliminarily reviewed... that adequate collateral has been demonstrated ..., and that the tentative terms of the loan are specifically identified and are satisfactory to both borrower and lender." 5 FCC Rcd. at 5160.

Measured against these standards, the Review Board characterized Mission's August 31, 1984 bank letter as "woefully deficient" because:

> "... it does not specifically identif[y]' most of the significant terms including interest rate, terms of repayment, and collateral requirements. Moreover, the letter ... does not indicate either that any longstanding relationship exists between borrower and lender, or that the applicant has provided sufficient information about itself which the bank has reviewed to its satisfaction so as to provide reasonable assurance that the loan will be forthcoming. *Scioto*, 5 FCC Rcd. at 5160; *see Marlin Broadcasting of Central Florida*, 5 Fcc Rcd. 575 (1990)." *Order*, FCC 92R-76, released September 22, 1992.

23. The fact that Mission relied on an oral commitment rather than the August 31, 1984 letter does not change the situation. The record continues to be silent on the "central" factors set out in *Scioto, supra*. The bank did not review Mission's qualifications; collateral was not mentioned, much less demonstrated; and there have never been any "tentative terms" pertaining to the proposed loan. If, indeed, the bank's August 31, 1984 letter "confirms" anything at all about the earlier oral discussion among Messrs. Adams, Caswell and Little, it is that that discussion did not embrace significant items such as interest rate, repayment terms, and collateral requirements. The August 31, 1984 bank letter was silent as to such factors because they were never addressed or discussed by Mission and the bank. The oral discussion stands on no better footing than the "woefully deficient" August 31, 1984 letter.

IV. ULTIMATE CONCLUSIONS

24. Mr. Little's purpose in dealing with the bank, and such presentation as he made to the bank were, in his contemplation, solely on behalf of Mission Broadcasting. Mr. Little left the bank reasonably believing that his purpose had been accomplished. Little's certification of Mission's application on July 18, 1984 was not false.

25. The bank's focus on the would-be borrower Mission Broadcasting Corporation was only cursory. Such assurance as the bank did give was given to Mr. Little personally, and only secondarily to Mission. Because this secondary, or incidental, assurance does not meet the strictures of *Scioto, supra*, Mission must be found to be financially unqualified.

26. Accordingly, IT IS ORDERED that unless an appeal from this Supplemental Initial Decision is taken by a party or it is received by the Commission on its own motion, Mission Broadcasting Corporation is not financially qualified to be a Commission licensee.[1]

FEDERAL COMMUNICATIONS COMMISSION

Edward Luton
Administrative Law Judge

[1] In the event exceptions are not filed within thirty (30) days after the release of this Supplemental Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective fifty (50) days after its release pursuant to Section 1.276 (d) of the Commission's Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Coast Community College District against Century Southwest Cable Television	CSR-4044-M
Request for Carriage	

MEMORANDUM OPINION AND ORDER

Adopted: December 23, 1993; Released: February 4, 1994

By the Chief, Mass Media Bureau:

1. On August 27, 1993, a petition on behalf of Coast Community College District, licensee of Station KOCE-TV (Educ., Ch. 50), Huntington Beach, California, was filed with the Commission claiming that Century Southwest Cable Television ("Century"), operator of cable television systems serving Santa Monica, West Los Angeles, Beverly Hills/West Hollywood, Redondo Beach, Marina Del Rey, Eagle Rock, Van Nuys and Bell Canyon, California, had declined to carry the station, even though the city of license of KOCE-TV is within fifty miles of the systems' principal headends at Los Angeles and Redondo Beach[1] and the station is therefore a "local" signal within the meaning of §5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992). No opposition to this petition has been filed.

2. In support of its petition, KOCE-TV states that it has repeatedly requested carriage from Century (as well as the systems' previous owner) from as far back as April 18, 1989 without result despite the fact that KOCE-TV is carried on systems surrounding Century's. KOCE-TV argues that this makes it impossible for its signal to be received by Century's more than 150,000 subscribers, many of whom inquire as to why KOCE-TV's signal is unavailable. In letters dated April 29, 1993 and May 1, 1993 from Century, KOCE-TV indicates that it was advised "that inadequate signal strength and/or copyright liability may adversely affect your must carry rights on the system." KOCE-TV states, however, that Century supplies no signal strength measurements for the subject systems to substantiate its claims.[2] KOCE-TV maintains that its own tests indicate that adequate signal strength is present for both headends. In the event it is not, KOCE-TV asserts that it will provide a reasonable receiving antenna and amplification equipment.

3. KOCE-TV's petition establishes that it is entitled to carriage on the Los Angeles and Redondo Beach systems. Since no other pleadings have been filed in this matter, the complaint filed August 27, 1993, by Coast Community College District IS GRANTED, in accordance with §615(j)(3) (47 U.S.C. §535) of the Communications Act of 1934, as amended, and Century Southwest Cable Television IS ORDERED to commence carriage of KOCE-TV forty-five (45) days from the release date of this *Order*. This action is taken by the Chief, Mass Media Bureau, pursuant to authority delegated by §0.283 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

[1] Century serves the listed communities from two separate headends. The first serves the communities surrounding Los Angeles (Santa Monica, West Los Angeles, Beverly Hills/West Hollywood, Marina del Rey, Eagle Rock, Van Nuys and Bell Canyon), and is located at Latitude $34^{0}01'53"$, Longitude $118^{0}27'49"$. The second serves Redondo Beach and is located at Latitude $33^{0}50'50"$, Longitude $118^{0}22'42"$.

[2] KOCE-TV points out a signal strength showing that Century included with its May 1, 1993 letter regarding its system in Ventura, California. However, KOCE-TV states, it has not requested carriage in Ventura.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Greater Dayton Public Television against KENS Cable — CSR-4031-M

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: December 23, 1993; Released: February 4, 1994

By the Chief, Mass Media Bureau:

1. On August 23, 1993, a petition on behalf of Greater Dayton Public Television, licensee of Television Broadcast Station WPTO (Educ., Ch. 14), Oxford, Ohio, was filed with the Commission claiming that KENS Cable ("KENS"), operator of a cable television system serving Harveysburg, Ohio, had declined to carry the station, even though WPTO is within fifty miles of the system's principal headend at Harveysburg[1] and the station is therefore a "local" signal within the meaning of §5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992). WPTO requests that the Commission not only order KENS to carry its signal on the cable system, but also order that the system carry it on channel 14, the channel on which it broadcasts over-the-air. No opposition to this petition has been filed.

2. WPTO's petition establishes that it is entitled to carriage on the Harveysburg system and it has requested carriage on its over-the-air broadcast channel, as it is permitted to do under §5 of the 1992 Cable Act. Since no other pleadings have been filed in this matter, the complaint filed August 23, 1993, by Greater Dayton Public Television IS GRANTED, in accordance with §615(j)(3) (47 U.S.C. §535) of the Communications Act of 1934, as amended, and KENS Cable IS ORDERED to commence carriage of WPTO on cable channel 14 forty-five (45) days from the release date of this *Order*. This action is taken by the Chief, Mass Media Bureau, pursuant to authority delegated by §0.283 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

[1] We note that KENS Cable has not provided its headend coordinates to WPTO as required by §76.58(b) of the Rules, despite WPTO's telephone conversation of July 21, 1993 requesting such information. Since no opposition to WPTO's complaint has been filed, we accept petitioner's conclusion that KENS Cable's headend for this system is located at Harveysburg, Ohio.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Greater Dayton Public Television against KENS Cable — CSR-4033-M

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: December 23, 1993; Released: February 4, 1994

By the Chief, Mass Media Bureau:

1. On August 23, 1993, a petition on behalf of Greater Dayton Public Television, licensee of Television Broadcast Station WPTO (Educ., Ch. 14), Oxford, Ohio, was filed with the Commission claiming that KENS Cable ("KENS"), operator of a cable television system serving Clarksville, Ohio, had declined to carry the station, even though WPTO is within fifty miles of the system's principal headend at Clarksville[1] and the station is therefore a "local" signal within the meaning of §5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992). WPTO requests that the Commission not only order KENS to carry its signal on the cable system, but also order that the system carry it on channel 14, the channel on which it broadcasts over-the-air. No opposition to this petition has been filed.

2. WPTO's petition establishes that it is entitled to carriage on the Clarksville system and it has requested carriage on its over-the-air broadcast channel, as it is permitted to do under §5 of the 1992 Cable Act. Since no other pleadings have been filed in this matter, the complaint filed August 23, 1993, by Greater Dayton Public Television IS GRANTED, in accordance with §615(j)(3) (47 U.S.C. §535) of the Communications Act of 1934, as amended, and KENS Cable IS ORDERED to commence carriage of WPTO on cable channel 14 forty-five (45) days from the release date of this *Order*. This action is taken by the Chief, Mass Media Bureau, pursuant to authority delegated by §0.283 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

[1] We note that KENS Cable has not provided its headend coordinates to WPTO as required by §76.58(b) of the Rules, despite WPTO's letter of July 12, 1993 requesting carriage. Since no opposition to WPTO's complaint has been filed, we accept petitioner's conclusion that KENS Cable's headend for this system is located at Clarksville, Ohio.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Central Missouri State University against Cass County Cable — CSR-3964-M

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: December 8, 1993; Released: February 4, 1994

By the Chief, Mass Media Bureau:

1. On July 8, 1993, a petition on behalf of Central Missouri State University, licensee of Station KMOS-TV (Educ., Ch. 6), Sedalia, Missouri, was filed with the Commission claiming that Cass County Cable ("Cass"), operator of a cable television system serving Cass County, Missouri, had declined to carry the station, even though the Grade B contour of KMOS-TV encompasses the system's principal headend at Greenwood[1] and the station is therefore a "local" signal within the meaning of §5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992). KMOS-TV requests that the Commission not only order Cass to carry its signal on the cable system, but also order that the system carry it on Channel 6, the channel on which it broadcasts over-the-air. No opposition to this petition has been filed.

2. KMOS-TV's petition establishes that it is entitled to carriage on the Cass County system and it has requested carriage on its over-the-air broadcast channel, as it is permitted to do under Section 5 of the 1992 Cable Act. Since no other pleadings have been filed in this matter, the complaint filed July 8, 1993, by Central Missouri State University IS GRANTED, in accordance with §615(j)(3) (47 U.S.C. 535) of the Communications Act of 1934, as amended, and Cass County Cable IS ORDERED to commence carriage of KMOS-TV on cable channel 6 forty-five (45) days from the release date of this *Order*. This action is taken by the Chief, Mass Media Bureau, pursuant to authority delegated by §0.283 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

[1] We note that Cass has not provided its headend coordinates to KMOS-TV as required by Section 76.58(b) of the Rules, despite KMOS-TV's letter of November 25, 1992 requesting carriage. Since no opposition to KMOS-TV's complaint has been filed, we accept petitioner's conclusion that Cass' headend for this system is located at Greenwood, Missouri.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Application of D.D. Cable Partners, L.P. CSR-4084-T

Waiver of 47 C.F.R. § 76.502(a)

MEMORANDUM OPINION AND ORDER

Adopted: December 23, 1993; Released: February 4, 1994

By the Chief, Mass Media Bureau:

1. On September 21, 1993, D.D. Cable Partners, L.P. ("D.D. Cable") filed a request for waiver of 47 C.F.R. § 76.502(a), the Commission's anti-trafficking rule, for five cable systems in Wisconsin, Illinois, Minnesota, and Iowa.[1]

2. Section 617 was recently added to the Communications Act of 1934 as part of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Act"). Section 617, which establishes a three-year holding period for cable systems, is largely self-executing and became effective on December 4, 1992, pursuant to the terms of the 1992 Act. Section 617 provides, with certain exceptions, that "no cable operator may sell or otherwise transfer ownership in a cable system within a 36 month period following either the acquisition or initial construction of such system by such operator."[2] For purposes of this provision, transactions which involve multiple systems and which require the buyer to subsequently transfer one or more such systems to one or more third parties are considered part of the initial transaction.[3]

3. Section 617(d) authorizes the Commission to grant waivers of the restriction consistent with the public interest. *See* 47 U.S.C. § 537(d). Such waivers, however, are subject to the approval of the local franchise authority, if such approval is required. *Id.* In implementing this Section of the 1992 Act, the Commission concluded that, in assessing a waiver request, the Commission will look favorably upon waiver requests involving multiple system operators or transfers of multiple systems if at least two-thirds of the subscribers of the systems being transferred are served by systems owned by the cable operator for three years or more. *See Report and Order and Further Notice of Proposed Rule Making* (Horizontal and Vertical Ownership Limits, Cross-Ownership Limitations and Anti-Trafficking Provisions) (*"Report and Order"*), 8 FCC Rcd 6828, 6836 (1993); 47 C.F.R. § 76.502(g)(1). The Commission also concluded that transfers of cable systems serving 1,000 or fewer subscribers would be subject to a blanket Commission waiver. *Id.* at 6841.

4. D.D. Cable states that it acquired the stock of Star Midwest, Inc. on June 30, 1992, and, as a result, acquired cable systems serving 125,000 subscribers in 227 franchise areas. D.D. Cable desires to sell the cable systems served by the five headends listed above. These five headends include 12 franchise areas and represent one-half of one percent of the total franchises acquired in the transaction. D.D. Cable operates the 12 franchises as a single "district." The five headends range from 519 to 1348 subscribers and the 12 franchises range from 165 subscribers to 879 subscribers. The Mt. Pulaski, Niantic, and Bushnell headends serve less than 1,000 subscribers. The Breese headend serves 1,348 subscribers and the Ladd headend serves 1,332 subscribers. D.D. Cable requests a blanket waiver for the Mt. Pulaski, Niantic, and Bushnell systems, and also requests a waiver for the Breese and Ladd systems.

5. D.D. Cable intends to sell the 12 franchises to TCI.[4] According to D.D. Cable, the 12 franchises are adjacent to, and would be consolidated with, existing TCI systems, thus creating operating efficiencies. In support of its waiver request for the Breese and Ladd systems, D.D. Cable states that it is selling to its indirect parent TCI, and that, as Congress stated, transfers between affiliates are generally not "profiteering transactions" of the type sought to be limited by the three-year holding rule. Second, D.D. Cable notes that all of the franchises, except the four communities served by the Ladd headend, require the approval of the franchise authority, and that the four Ladd communities will receive 60-days notice, as required by the franchising agreement. D.D. Cable also notes that the Breese and Ladd systems "are part of a five headend 'cluster' and cannot be operated economically on a stand-alone basis," and that the Breese and Ladd systems, as well as the other three in the cluster, are unprofitable.[5] Finally, D.D. Cable notes that although the two headends serve more than 1,000 subscribers, neither of them serves a franchise area with more than 830 subscribers.

6. First, we will grant a waiver for the three systems serving less than 1,000 subscribers, pursuant to 47 C.F.R. § 502(g)(2). With respect to the other two systems, we note that the two systems are barely over the 1,000 subscriber limit for the blanket waiver provision. Further, the sale involves only 2,680 subscribers out of 125,000 in the original transaction in 1992. Also, each of the systems involved here is being sold to an existing adjacent system with which it will be consolidated. Based on the totality of the circumstances presented in D.D. Cable's waiver request, we find that grant of the subject petition would be consistent with the obligations under Section 617(d), and that such a waiver is in the public interest.

7. In view of the above, IT IS ORDERED that, the request for waiver of 47 C.F.R. § 76.502(a) IS GRANTED.

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[1] The relevant systems are served by the following principal headends: Breese, Mt. Pulaski, Niantic, Bushnell, and Ladd.

[2] 47 U.S.C. § 537(a); 47 C.F.R. § 76.502(a).

[3] 47 U.S.C. § 537(b); 47 C.F.R. § 76.502(e).

[4] TCI has a 47.4% indirect limited partnership interest in Robin Media Group, Inc., which has a 49.4% interest in D.D. Cable.

[5] While this may be true, we note that D.D. Cable has presented no evidence of the financial condition of the cable systems involved here.

8. This action is taken by the Chief, Mass Media Bureau pursuant to authority delegated by Section 0.283 of the Commission's rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Greater Dayton Public Television against KAS Cable	CSR-4032-M OH0432

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: December 23, 1993; Released: February 4, 1994

By the Chief, Mass Media Bureau:

1. On August 23, 1993, a petition on behalf of Greater Dayton Public Television, licensee of Television Broadcast Station WPTO (Educ., Ch. 14), Oxford, Ohio, was filed with the Commission claiming that KAS Cable ("KAS"), operator of a cable television system serving Wright Patterson AFB, Ohio, had declined to carry the station, even though WPTO is within fifty miles of the system's principal headend at Fairborn, Ohio[1] and the station is therefore a "local" signal within the meaning of §5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992). WPTO requests that the Commission not only order KAS to carry its signal on the cable system, but also order that the system carry it on channel 14, the channel on which it broadcasts over-the-air. No opposition to this petition has been filed.

2. WPTO's petition establishes that it is entitled to carriage on the Wright Patterson AFB system and it has requested carriage on its over-the-air broadcast channel, as it is permitted to do under §5 of the 1992 Cable Act. Since no other pleadings have been filed in this matter, the complaint filed August 23, 1993, by Greater Dayton Public Television IS GRANTED, in accordance with §615(j)(3) (47 U.S.C. §535) of the Communications Act of 1934, as amended, and KAS Cable IS ORDERED to commence carriage of WPTO on cable channel 14 forty-five (45) days from the release date of this *Order*. This action is taken by the Chief, Mass Media Bureau, pursuant to authority delegated by §0.283 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

[1] We note that KAS Cable has not provided its headend coordinates to WPTO as required by §76.58(b) of the Rules, despite WPTO's letter of May 28, 1993 requesting such information. Since no opposition to WPTO's complaint has been filed, we accept petitioner's conclusion that KAS Cable's headend for this system is located at Fairborn, Ohio.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

BellSouth Telecommunications Tariff F.C.C. No. 1 — Transmittal Nos. 149 and 184

ORDER

Adopted: January 27, 1994; Released: January 27, 1994

By the Acting Chief, Common Carrier Bureau:

1. BellSouth Telecommunications, Inc. (BellSouth) filed Transmittal No. 149 on September 30, 1993, to introduce Smartpath service.[1] Smartpath is a shared high capacity network which provides a 1.544 Mbps transport link between: (1) a customer's premises and another customer-designated premises in the same Smartpath serving area; or (2) a serving wire center in the same Smartpath service area for connection to other services[2] or to another Smartpath service area in the same metropolitan area.[3] Smartpath service offers high performance and reliability parameters and a level of redundancy and diversity designed to limit a single event from interrupting service. Description and Justification (D&J) at 2. Transmittal 149 is scheduled to become effective on January 28, 1994.

2. On October 15, 1993, MFS Communications Company (MFS) filed a petition to reject or, in the alternative, to suspend and investigate Transmittal 149. BellSouth replied on October 25, 1993.

3. MFS contends that BellSouth not only failed to provide adequate cost support for its transmittal, but that the cost support data that BellSouth did provide indicates that Smartpath service may be priced below its cost. MFS Petition at 2. MFS maintains that although BellSouth does not charge distance-sensitive rates for Smartpath service, the costs of the interoffice transport inherent in the service must increase as mileage increases. However, because BellSouth provides no data concerning the average length of haul for its proposed service, MFS asserts that it is impossible to determine if the distance-insensitive rates proposed by BellSouth are adequate to recover the distance-sensitive costs involved in the provision of the service. *Id.* at 2-3.

4. MFS alleges that because Smartpath service rates are set at levels as much as 33 percent below standard DS1 rates, there will be substantial migration from standard DS1 to Smartpath. When stranded plant and loss of standard DS1 overheads associated with substantial migration are considered, declares MFS, the proposed Smartpath service rates appear to be set a levels substantially below cost. MFS Petition at 3.

5. MFS alleges that BellSouth's proposal to establish a service credit equal to 1296/1440 for the monthly Smartpath rate as part of its performance guarantee is unjustified and predatory. Finally, MFS asserts that BellSouth offers no justification for limiting the availability of Smartpath service to the Atlanta metropolitan area -- an area in which MFS currently provides service. MFS petition at 4.

6. BellSouth replies that MFS's objections to Transmittal 149 are based on the incorrect premise that Smartpath is a DS1 service. According to BellSouth, Smartpath and DS1 are functionally distinct services: (a) the standard for Smartpath is 99.95 percent error free seconds, compared to 98.75 percent error free seconds for DS1; (b) Smartpath is provided on a totally fiber transport network, whereas DS1 service is provided over a mix of copper, fiber, and microwave facilities; and (c) Smartpath provides redundancy and diversity of network facilities so that no single network failure would result in a service interruption, while such a range of redundancy and diversity is not available for DS1 service. BellSouth Reply at 3 and n.2-4.

7. BellSouth denies that Smartpath service is priced at below relevant costs. BellSouth asserts that Smartpath employs a ring architecture to which average length of haul is not particularly germane -- costs for Smartpath service are based on the total cost of facilities used to provide Smartpath in the service area. BellSouth Reply at 4-5.

8. BellSouth denies that there will be substantial migration from DS1 to Smartpath. BellSouth Reply at 5.

9. BellSouth argues that its performance guarantee credit is appropriate because it reflects the service standard that the customer expects, and that is characteristic, of Smartpath. BellSouth professes that, contrary to MFS's apparent belief, it is highly improbable that there will be many instances where the credit will be paid, so this is no reason to find that its service is priced below cost. BellSouth Reply at 6.

10. BellSouth disagrees with MFS's contention that Smartpath is geographically limited and will likely be provided only where competitors such as MFS provide similar services. BellSouth Reply at 7.

11. The Common Carrier Bureau has reviewed the transmittals and all associated submissions. We conclude that no compelling argument has been presented that the tariff

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[1] BellSouth filed Smartpath service as a new service in accordance with the Commission's price caps rules.

[2] Smartpath provides for connection through a serving wire center in the same Smartpath service area to DS1 Basic Channelization, FlexServ service, Lightgate service, or Smartring service, as provided in Section 7 of BellSouth Tariff F.C.C. No. 1, or expanded interconnection services, as provided under Section 20 of the Tariff. Description and Justification at 3.

[3] BellSouth states that Smartpath service is available only in those locations where it can provide the specified level of performance and reliability associated with the service. BellSouth initially would offer Smartpath service only within the metropolitan area of Atlanta, Georgia. *Id.* at 5. BellSouth subsequently filed tariff revisions which: (1) list the ten metropolitan areas where it plans to deploy Smartpath service in 1994 and 1995; and (2) specify that a customer may request the service in additional locations by paying special construction charges, as set forth in BellSouth's Special Construction Tariff F.C.C. No. 2. BellSouth Transmittal No. 184 (filed Jan.26, 1994).

revisions are so patently unlawful as to require rejection, and that no question has been presented that warrants investigation at this time.

12. Accordingly, IT IS ORDERED that the petition to reject or, in the alternative, to suspend and investigate BellSouth Telecommunications Tariff F.C.C. No. 1, Transmittal No. 149, filed by MFS Communications Company IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Acting Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
January 24, 1994

Released: January 27, 1994

CERTIFIED MAIL -- RETURN RECEIPT REQUESTED

Jose R. DeLeon, Jr. President 1800C3-M
Telecorpus, Inc.
Licensee of Television Station KORO
102 N. Mesquite
Corpus Christi, TX 78401

Dear Mr. DeLeon:

This letter constitutes an admonishment for failure to comply with Sections 73.1942(a)(1)(x), 73.1942(b), and 73.1943 of the Commission's rules (47 C.F.R. Sections 73.1942(a)(1)(x), 73.1942(b), and 73.1943).

BACKGROUND

This action results from the audit, commenced June 10, 1992, of KORO to determine whether the station was complying with the political programming laws. On that date, an FCC FOB inspector arrived at your station to obtain a copy of your disclosure statement, if written, and your political file. Because your station's policies are not written, but disclosed orally, you described these policies in a letter to the Commission dated June 30, 1992. In our September 24, 1992, letter of inquiry, we asked you to answer two questions raised by our review of the materials provided. First, we noted that in your June 30 letter regarding disclosure, you stated that it was the station's policy to inform candidates that various program packages were available and to describe the packages and rates upon request. We asked whether the station had included the referenced package rates in its calculation of LUC. Second, regarding your June 30 letter, which revealed that five political contracts were placed in the business files and, as a result, were missing from the political file at the time of the audit, we asked what steps, if any, the station had taken to assure such errors were not repeated.

You responded by letter dated October 1, 1992. With respect to the package plan rates, you stated that the station's political rate card for the 1992 primary season was prepared on or about December 5, 1991, prior to the Commission's December 23, 1991, change in policy prohibiting stations from offering package plans as a separate class of time.[1] You admitted, however, that "station management overlooked the change in Commission policy at that time." Consequently, KORO did not disclose the package plan rates as calculated under the new rules; nor did it factor into its LUC calculations the rates that it charged for spots sold in packages during the LUC periods preceding the primary and run-off elections. You stated that appropriate changes to the LUC calculations were made prior to the general election. You also stated that rebates or credits would be given to candidates who purchased time during the pre-primary period if, as a result of factoring in package plan rates, such credits or rebates are warranted.

On October 2, 1992, your attorney filed with the Commission a letter stating that it was his law firm's responsibility to keep KORO current with respect to Commission regulations and that, as a result of administrative error, the firm did not advise KORO of the contents of the Commission's December 23, 1991, *Report and Order*. As a result, KORO was not aware of the change in policy with respect to the calculation of rates found in package plans. By letter dated October 9, you asked that your attorney's letter be considered part of your October 1 response.

With respect to the five contracts missing from the political file, you asserted that the station has implemented procedures to assure that such filing errors are not repeated. You noted that during the LUC period preceding the primary election on March 10, 1992, the station's Sales Manager was responsible for all sales of time to political candidates. However, you stated that during the LUC period that preceded the run-off election on April 14, 1992, the Sales Manager delegated that responsibility to the station's various account executives, resulting in three of the misfiled contracts. You further explained that the other two misfiled contracts were sent by your national sales office but were not associated with the political file. You noted that all sales of political time will now be handled by a single individual, the station's General Sales Manager, and that any contact with the station by a political candidate or his/her representative initiates the following action:

> (a) the creation of a memorandum to the Assistant Station Manager indicating that contact with the candidate was made; and
>
> (b) the creation of a folder with the candidate's name, which is placed in the public file where documents related to the candidate are to be placed.

In addition, you stated that all sales by the national sales representatives are to be reported by the station's traffic and operation clerks to the Assistant Station Manager, and that all sales are then checked again by the station's General Manager.

DISCUSSION

Package Plan Rates

The Commission, in its *Report and Order* codifying the political programming rules, revised its policy regarding the calculation of package rates for LUC purposes. Previously, the Commission had permitted broadcasters to offer

[1] The rules adopted in the Commission's 1991 codification of the political programming rules require stations, when computing or disclosing to candidates their lowest unit charge, to include in their lowest unit charge calculations all rates offered to commercial advertisers in packages. *Codification of the Commission's Political Programming Policies*, 7 FCC Rcd 678, 694-95 (1991)(*"Report and Order"*); *recon. denied*, 7 FCC Rcd 4611 (1992); 47 C.F.R. Section 73.1942(a)(1)(x).

fer package plans as a separate class of time provided the plans were offered to political advertisers on a pro-rata basis.[2] Based on a reevaluation of the statutory LUC requirements, however, the Commission revised this policy to require that all package rates be included in the station's calculation of LUC, and clarified that this policy applied to individually negotiated packages as well as those offered generally to all advertisers.[3] Section 73.1942(b) of the rules requires stations to disclose to candidates all rates and value-enhancing discount privileges offered commercial advertisers.[4] As a result, KORO was under an obligation to inform candidates that the rates found in the package plans were available to them on a per-spot basis without the necessity of purchasing all or a portion of the package. KORO did not disclose this information to candidates, in apparent violation of this disclosure obligation.

KORO admits that it failed to factor into its lowest unit charge calculations package plan rates as required by Section 73.1942(a)(1)(x).[5] You are directed to take appropriate action to rebate overcharges, if any, resulting from your failure to include package rates in your calculation of lowest unit charge, if you have not already done so. You are also directed to advise the Commission within twenty (20) days of the date of this letter whether rebates were required. If rebates were required, you are directed to submit a list specifying the amount of each rebate and to whom each rebate was given.

Although we recognize your attorney's candor with respect to his firm's involvement, it is ultimately the responsibility of the station to comply with all current rules and regulations of this Commission. *Lakewood Broadcasting Service, Inc.*, 37 FCC 2d 437 (1972). *Emporium Broadcasting Co*, 23 FCC 2d 868 (1970), *Paul A. Stewart Enterprises*, 45 FCC 773(1963).

Political File

Section 73.1943 of the Commission's rules provides as follows:

> (a) Every licensee shall keep and permit public inspection of a complete and orderly record (political file) of all requests for broadcast time made by or on behalf of a candidate for public office, together with an appropriate notation showing the disposition made by the licensee of such requests, and the charges made, if any, if the request is granted. The "disposition" includes the schedule of time purchased, when spots actually aired, the rates charged, and the classes of time purchased.
>
> * * * *
>
> (c) All records required by this paragraph shall be placed in the political file as soon as possible and shall be retained for a period of two years. As soon as possible means immediately absent unusual circumstances.

47 C.F.R. Section 73.1943.

KORO's failure to place in the political file five contracts for the sale of political time prior to the audit constitutes an apparent violation of the political file rule. Maintenance of an accurate political file is an essential element of Section 315 of the Communications Act, as implemented by Section 73.1943 of the rules. A station generally has no obligation to notify opposing candidates when a candidate appears on its facility, and opposing candidates have only seven days within which to make a request for "equal opportunities." Because you failed to include the necessary information in the file, opposing candidates did not have such information available for them in order to exercise their rights under Section 315 prior to the election.

CONCLUSION

Based on the foregoing, we hereby ADMONISH you for the violations of Sections 73.1942(b), 73.1942 (a)(1)(x), and 73.1943 of the Commission's rules. This matter will be made part of our permanent records. You should place this letter in the public inspection file required to be maintained by Section 73.3526 of the Commission's rules.

Sincerely,

Roy J. Stewart
Chief, Mass Media Bureau

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[2] The Commission permitted stations to offer a candidate the benefits of rates found in packages only if the candidate bought a pro-rata share of the package. Thus, if a package consisted of three spots in three different dayparts for a total of nine spots, a candidate could receive the benefits of the rates in that package by purchasing one spot in each daypart for a total of three spots. *See, 1984 Political Primer*, 100 FCC 2d 1476, 1515-16 (1984).

[3] *Report and Order*, 7 FCC Rcd at 694.

[4] Section 73.1942(b) states, in pertinent part, as follows:

> If a station permits a candidate to use its facilities, the station shall make all discount privileges offered to commercial advertisers, including the lowest unit charges for each class and length of time in the same time period and all corresponding discount privileges, available to candidates. This duty includes an affirmative duty to disclose to candidates information about rates and all value-enhancing discount privileges offered commercial advertisers.

[5] Section 73.1942(a)(1)(x) states:

> Unit rates charged as part of any package, whether individually negotiated or generally available to all advertisers, must be included in the lowest unit charge calculation for the same class and length of time in the same time period. A candidate cannot be required to purchase advertising in every program or daypart in a package as a condition for obtaining package unit rates.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
January 24, 1994

Released: January 27, 1994

CERTIFIED MAIL -- RETURN RECEIPT REQUESTED

Henry Broadcasting Company, Inc. 1800C3-M
Licensee of Radio Station KFAB(AM)
5010 Underwood Ave.
Omaha, NE 68132

Dear Licensee:

This letter constitutes an admonishment for your failure to comply with Section 312(a)(7) of the Communications Act (47 U.S.C. Section 312(a)(7)), as interpreted in the *Commission Policy in Enforcing Section 312(a)(7) of the Communications Act*, 68 FCC 2d 1079 (1978)(*"1978 Policy Statement"*). You are also cautioned with respect to obligations imposed by Section 73.1942(b)(1) of the rules (47 C.F.R. Section 73.1942(b)(1)).

BACKGROUND

This action results from the audit of KFAB, commenced June 10, 1992, to ascertain your compliance with the political programming laws. On that date, an FCC field inspector arrived at KFAB to obtain a copy of your disclosure statement, if written, and your political file. Based on the material you furnished to the inspector and your response to our September 24, 1992, letter of inquiry, it appears that KFAB has violated Section 312(a)(7) of the Communications Act, by limiting, in advance, the number of spots that federal candidates could purchase. You are also cautioned with respect to your lack of full disclosure as required by Section 73.1942(b)(1) of the rules by failing to disclose to political candidates a description and definition of each class of time available to commercial advertisers.

You provided the inspector with KFAB's political file and, for your disclosure statement, a copy of a document entitled "Political Rate Card 1992 Primary." In our letter of inquiry, we asked you, *inter alia*, to explain why your political rate card did not describe and define the classes of time available to commercial advertisers as required by Section 73.1942(b)(1) of the Commissions rules. Our inquiry also asked you to explain the section of the rate card limiting candidates, including federal candidates, to one spot per daypart, four spots per day and 28 spots per week, in light of the Commission's prohibition against flat bans in the sale of time to federal candidates.

You responded by letter dated October 8, 1992. With respect to describing and defining classes of time, you stated that KFAB offers commercial advertisers seven classes of time. You explained that the political rate card did not list any of the commercial classes, but instead offered two special candidates-only classes of time. The candidates-only, non-preemptible class of time was discounted to a rate equal to the commercial immediately preemptible class. You further explained that the preemptible class of time was offered to candidates at a rate lower than the commercial immediately preemptible class. You asserted that the station limited its political rate card to the two candidate-only classes of time based upon the Commission's 1991 *Report and Order*, in which we stated that stations may offer a non-preemptible, candidate-only class of time at a discount to political advertisers.[1]

You argued that KFAB reasonably assumed that if a station offers a "special candidate-only class of non-preemptible time at a discounted rate, it is not required to disclose to candidates other higher-priced classes of time, on the ground that no rational political buyer would seek to pay more." You argued that KFAB cannot be penalized for implementing this policy because the Commission did not clarify that candidates must be advised of all available rates even if the station offers a discounted candidate-only class of time until after the audit was initiated.[2]

With respect to the pre-set limits on the amount of time sold to federal candidates, you stated that those numbers "merely represent KFAB's desire to reasonably limit the total amount of political advertising time which would have to be carried on KFAB if all candidates exercised their statutory rights" under Section 315(a) and Section 312(a)(7). You asserted that KFAB would not have invoked these limits if doing so would have denied any candidate his/her rights granted under the Communications Act or Commission rules or policies.[3] Finally, you argued that since, to the best of your knowledge, no candidate has ever sought to purchase airtime in excess of KFAB's limits, it must be concluded that the "limits" established by KFAB are reasonable.

DISCUSSION

Flat Bans on Number of Spots Purchased by Federal Candidates

Section 312(a)(7) of the Communications Act of 1934, as amended, requires broadcasters to afford federal candidates reasonable access to their facilities or to permit the purchase of reasonable amounts of time. 47 U.S.C. Section

[1] *Codification of the Commission's Political Programming Policies*, 7 FCC Rcd 678, 692-93 n.144 (1991)(*"Report and Order"*), *recon. denied*, 7 FCC Rcd 4611 (1992)(*"Memorandum Opinion and Order"*).

[2] *See Memorandum Opinion and Order*, 7 FCC Rcd at 4620.

[3] You further assert that the hoped for limits were set at a sufficiently high level so as to enable candidates to reach a significant element of KFAB's weekly audience. You submit a TAPSCAN analysis to demonstrate that the limit of 28 announcements per week exceeds industry standards on weekly frequency. You argue that, as a result, 28 announcements qualify as "reasonable access" under 312(a)(7).

312(a)(7). In the *1978 Policy Statement*, the Commission set forth its policies used in enforcing Section 312(a)(7).[4] The Commission stated:

> We believe it to be generally unreasonable for a licensee to follow a policy of flatly banning access by a Federal candidate to any of the classes and lengths of program or spot time in the same periods which the station offers to commercial advertisers.[5]

Instead, all requests for time by federal candidates must be considered on an individualized basis. KFAB's policy of limiting federal candidates to a specific number of spots per daypart, per day, and per week apparently violates Section 312(a)(7). As noted above, the Commission has repeatedly emphasized in interpreting Section 312(a)(7), that a station cannot decide in advance how much time it will sell to federal candidates. Rather, each request must be considered individually, taking into account the particular needs of each candidate. The pre-set limits adopted by KFAB thus apparently denied federal candidates the opportunity to purchase reasonable amounts of time in violation of Section 312(a)(7).[6]

Your assertion that KFAB never enforced its pre-set limits does not establish that candidates were not denied their right to purchase reasonable amounts of time. Due to your policy, candidates who wished to purchase additional time during the days immediately preceding the election would have been deterred from making such requests and may not have known that they were entitled to ask for additional time.[7] Indeed, the only candidate to purchase time from KFAB bought only up to the limitation listed on the rate card.

Disclosure

The Commission's 1991 political programming *Report and Order* specifically imposed affirmative disclosure obligations upon broadcast stations and cable systems.[8] The *Report and Order* also codified these requirements in Sections 73.1942(b)(1-5) of the Commission's rules. Section 73.1942(b)(1) requires the following:

> (1) A description and definition of each class of time available to commercial advertisers sufficiently complete to allow candidates to identify and understand what specific attributes differentiate each class. KFAB did not describe and define to candidates the classes of time it offered to commercial advertisers. Section 73.1942(b)(1) clearly states that information regarding classes of time offered commercial advertisers must be disclosed to candidates. The language of Section 73.1942(b)(1) is unambiguous, and nothing in footnote 144 of the *Report and Order*, which authorized discounted candidate-only classes of non-preemptible time, modifies the requirements set out in the rule.

We believe, however, that because KFAB developed a rate structure which offered benefits to political candidates, thereby demonstrating a good-faith effort to comply with our rules, a caution for your failure to disclose is appropriate.

CONCLUSION

Based on the foregoing, we hereby admonish you for the violation of Section 312(a)(7) of the Communications Act. This matter will be made part of your permanent records. You should place this letter in the public inspection file required to be maintained by Section 73.3526 of the rules. You are also cautioned to disclose to candidates all of the information set out in Section 73.1942(b)(1) of the Commission's rules.

Sincerely,

Roy J. Stewart
Chief, Mass Media Bureau

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[4] 68 FCC 2d 1079.

[5] *Id.* at 1090. The Supreme Court affirmed the Commission's prohibition against the use of flat bans in the sale of time to federal candidates. *CBS, Inc. v. FCC*, 453 U.S. 387, 389 (1981)("*Carter/Mondale*"). Furthermore, in its *Report and Order* codifying the political programming laws, the Commission reiterated its prohibition against the use of flat bans. 7 FCC Rcd at 681.

[6] A station is permitted, however, to consider such factors as the number of candidates in a race and the potential disruption to its program schedule when affording access, provided these considerations are made on a case by case basis, and take into account the needs of the candidate. For a discussion of the various factors a station may weigh when considering a reasonable access request, *see Report and Order*, 7 FCC Rcd 678, 681-2.

[7] We also reject, for the same reasons, the argument that the TAPSCAN analysis proves that 28 spots per week is reasonable for purposes of reasonable access.

[8] *Report and Order*, 7 FCC Rcd at 688-89.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
Janaury 24, 1994

Released: January 27, 1994

CERTIFIED MAIL -- RETURN RECEIPT REQUESTED

K-Six Television, Inc. 1800C3-M
Licensee of Television Station KZTV
310 Artesian St.
Corpus Christi, TX 78401

Dear Licensee:

This letter constitutes an admonishment for your failure to comply with Section 312(a)(7) of the Communications Act (47 U.S.C. Section 312(a)(7)), as interpreted in *Commission Policy in Enforcing Section 312(a)(7) of the Communications Act*, 68 FCC 2d 1079 (1978)(*"1978 Policy Statement"*) and Section 73.1942(b)(1-4) of the Commission's rules (47 C.F.R Section 73.1942(b)(1-4)).

BACKGROUND

This action results from the audit of KZTV, commenced June 10, 1992, to ascertain your compliance with the political programming laws. On that date, an FCC field inspector arrived at your station to obtain a copy of your disclosure statement, if written, and your political file. Based on the materials provided during the audit and your September 30, 1992, response to our September 24, 1992, letter of inquiry, we find that KZTV apparently imposed a flat ban on the number of spots that could be purchased by federal candidates, in violation of Section 312(a)(7) of the Act. In addition, we find that KZTV apparently failed to disclose to candidates information regarding its selling practices in violation of Section 73.1942(b)(1-4) of the Commission's rules. You provided the inspector with a written disclosure statement entitled "Political Rate Card Effective 1/25/92," and your political file. In our September 24, letter of inquiry, we posed several questions raised by our review of the materials provided by KZTV. We asked you to explain how the following practices were consistent with the Communications Act and the Commission's rules and policies:

1. Your political rate card limited all candidates, including federal candidates, to no more than two 30-second announcements in prime time during the five days preceding election day. You also limited the purchase of daytime rotator spots to no more than six per day.

2. The station did not appear to disclose to candidates, as required by Section 73.1942(b)(1-4) of the Commission's rules: a) a description and definition of each class of time made available to commercial advertisers; b) privileges related to lowest unit charge such as"priorities against preemption and make goods; c) the likelihood of preemption; and d) a description of time sold on a demand-generated basis.[1]

Regarding KZTV's apparent limit on the number of spots purchased by federal candidates, you explained that the purpose of the limitation was not to deny access but to guarantee reasonable access. You argued that a first-come, first-served policy would not enable a station to provide reasonable access, and that the limitation was the fairest way to provide access and to prevent block booking by opponents. You also asserted that the proposed allocation of spots was never put into effect, and that the station never received a complaint about the limitation from a political advertiser.

With respect to KZTV's apparent failure to describe and define all classes of time offered to commercial advertisers, you asserted that the agencies placing orders for candidates were "well acquainted with station rates and policies" and that local agencies "have access to current prevailing rates," presumably eliminating the need for complete disclosure. You also stated that the political rate card "was designed for the convenience of local candidates" so that they would not become confused by a "myriad of fixed, preemptible or multiple classes of time."

Regarding an apparent lack of disclosure of the likelihood of preemption, you responded that because the station had a policy of not preempting candidates, there was no likelihood of preemption to disclose. Similarly, regarding disclosure of the station's make-good policy and other priorities against preemption, you argued that candidates could be preempted only for technical difficulties and that in such instances, candidates would be offered timely make goods. Finally, concerning KZTV's apparent lack of disclosure of demand-generated rates, you stated merely that "any so-called demand-generated rates can not be applied to political advertisers who are to receive only the lowest unit charge."

DISCUSSION

Flat Bans on Spots Purchased by Federal Candidates

Section 312(a)(7) of the Communications Act requires broadcasters to afford federal candidates reasonable access to their facilities or to permit the purchase of reasonable amounts of time. 47 U.S.C. Section 312(a)(7). In the *1978 Policy Statement*, the Commission clarified its policy in enforcing Section 312(a)(7). The Commission stated:

[1] The Bureau's letter also asked about the 1991 and 1992 political files which were not in the public file when the FCC field inspector arrived at the station. The 1992 files were provided to the inspector shortly after his arrival and the 1991 files were provided about five minutes later. You responded that the files had been removed to the Commercial Manager's office to update agency addresses and note that the files were provided promptly upon request. We find your explanation adequate, and will take no further action regarding this issue.

> We believe it to be generally unreasonable for a licensee to follow a policy of flatly banning access by a Federal candidate to any of the classes and lengths of program or spot time in the same periods which the station offers to commercial advertisers.[2]

Instead, all requests for time by federal candidates must be considered on an individualized basis.

KZTV's policy of prohibiting federal candidates from purchasing more than two 30-second announcements in prime time during the five days immediately preceding the election, and from purchasing more than six rotator spots per day, apparently violates Section 312(a)(7). As noted above, the Commission has repeatedly emphasized in interpreting Section 312(a)(7) that a station cannot decide in advance how much time it will sell to federal candidates. Rather, each request must be considered individually, taking into account the particular needs of each candidate. The pre-set limits adopted by KZTV thus appear to have denied federal candidates the opportunity to purchase reasonable amounts of time in violation of the statutory access provision.[3]

Your assertion that no candidate complained about the limits does not establish that candidates were not denied their right to purchase reasonable amounts of time. Due to your policy, a candidate who wished to purchase additional time during the days immediately preceding the election would have been deterred from making such a request. Having read the limitation, candidates may not have known that they were entitled to ask for additional time, instead choosing to purchase other time periods for which no limitation was imposed. [4]

Failure to Disclose

The Commission's 1991 *Report and Order* codifying the political programming laws specifically imposed affirmative disclosure obligations upon broadcast stations.[5] The Commission stated that:

> Political broadcasting obligations are imposed upon station licensees, not on candidates and their representatives. The representatives' or candidates' knowledge, or lack thereof, does not replace the broadcaster's obligation to offer candidates the benefits of lowest rates and any associated discount privileges for the various classes and lengths of time and time periods. It is thus incumbent upon the broadcaster to disclose to candidates all information concerning the lowest unit charges made available to commercial advertisers, together with discount privileges associated by the broadcaster with those rates.[6]

The pertinent disclosure requirements are codified in Section 73.1942(b)(1-4) of the Commission's rules, which require, at a minimum, disclosure of the following information:

> (1) A description and definition of each class of time available to commercial advertisers sufficiently complete to allow candidates to identify and understand what specific attributes differentiate each class;
>
> (2) A description of the lowest unit charge and related privileges (such as priorities against preemption and make goods prior to specific deadlines) for each class of time offered to commercial advertisers;
>
> (3) A description of the station's method of selling preemptible time based upon advertiser demand, commonly known as the "current selling level," with the stipulation that candidates will be able to purchase at these demand-generated rates in the same manner as commercial advertisers; and
>
> (4) An approximation of the likelihood of preemption for each kind of preemptible time.[7]

KZTV apparently did not disclose to candidates a substantial portion of the required information. Your response indicated that KZTV offered commercial advertisers three classes of time: fixed, preemptible, and run-of-schedule. These classes of time were apparently not disclosed to candidates as required by Section 73.1942(b)(1). You argued, instead, that it was not necessary to disclose information regarding the various classes of time offered to commercial advertisers because the rate on the rate card reflected the station's lowest unit charge for each time period available, and because the agencies representing candidates were either experienced or had access to the station's commercial rates. You also claimed that a rate card showing all the rates would only have confused candidates.

As discussed above, however, the lowest unit charge obligations are imposed on stations, not on candidates, and a station may not tailor its disclosure to what it considers to be the relative expertise of the buyer.[8] As a result, KZTV's failure to disclose a description and definition of all classes of time offered by the station, including the class

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[2] *1978 Policy Statement*, 68 FCC 2d at 1090. The Supreme Court affirmed the Commission's prohibition against the use of flat bans in the sale of time to federal candidates. *CBS, Inc. v. FCC*, 453 U.S. 387, 389 (1981)("*Carter/Mondale*". Furthermore, in its recent *Codification of the Commission's Political Programming Policies*, 7 FCC Rcd 678, 681, (1991)("*Report and Order*"); *recon. denied*, 7 FCC Rcd 4611 (1992)("*Memorandum Opinion and Order*"), the Commission reiterated its prohibition against the use of flat bans.

[3] A station is permitted, however, to consider such factors as the number of candidates in a race and the potential disruption to its program schedule when affording access, provided these considerations are made on a case by case basis, and take into account the needs of the candidate. For a discussion of the various factors a station may weigh when considering a reasonable access request, *see Report and Order*, 7 FCC Rcd 678, 681-2.

[4] The two federal candidates who purchased time from the station did not buy any time during either the prime time or rotator time periods.

[5] *Report and Order*, 7 FCC Rcd at 688-89.

[6] *Id.* at 688.

[7] 47 C.F.R. Section 73.1942(b)(1-4). Section 73.1942(b)(5) requires disclosure of information about audience-delivery sales practices, which are not the subject of this letter.

[8] Of course, if a candidate (or the candidate's representative) does not wish an oral or written catalogue of available rates, it is sufficient that the station attempt to inform that candidate of its sales practices. In addition, after a station has once made full disclosure to a particular candidate or the candidate's representative during a given campaign, full disclosure need not occur each time a buy is made, although any changes in rates or other information that may arise subsequent to the initial dis-

associated with the one rate listed on the political rate card, constitutes an apparent violation of Section 73.1942(b)(1) of our rules.

Similarly, it appears that KZTV violated Section 73.1942(b)(2) by failing to disclose its make-good policy to candidates. This information was not contained in the rate card, nor do you assert that it was disclosed in any other manner. As set forth above, the rate card specifically states that fixed rates preempt rotation announcements. Whatever make-good policies were employed by the station in connection with such preemption should have been disclosed to candidates and were not, in apparent violation of our rules.

Regarding disclosure of the station's selling practices for demand-generated rates required under Section 73.1942(b)(3), you argue that this rule cannot "be applied to political advertisers who are to receive only the lowest unit charge." It is unclear from this statement whether the station uses a system of demand-generated preemptible time rates. However, and contrary to your assertions, candidates must be permitted to purchase at higher, intermediate preemptible rates, subject to rebates down to the lowest unit charge that actually clears during a particular time period. If such a demand-generated system is used, the availability of intermediate rates must be disclosed to candidates.

Finally, your claim that you did not disclose the likelihood of preemption because KZTV did not preempt political advertisers is inconsistent with the information disclosed to candidates on the political rate card. The political rate card specifically states that announcements placed on the station's rotation system available in prime time and daytime were subject to preemption by fixed rates. Yet, KZTV did not disclose the likelihood of preemption associated with the rotator class of time. If preemptible time is offered, this information must be disclosed to candidates, even if the likelihood of preemption is zero. KZTV's failure to disclose this information constitutes an apparent violation of Section 73.1942(b)(4).

CONCLUSION

Based on the foregoing, we hereby ADMONISH you for the violations of Section 312(a)(7) of the Act and Section 73.1942(b)(1-4) of the Commission's rules. This matter will be made part of our permanent records. You should place this letter in the public inspection file required to be maintained by Section 73.3526 of the rules.

Sincerely,

Roy J. Stewart
Chief, Mass Media Bureau

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closure (or subsequent candidate transactions) must be disclosed during each succeeding negotiation. *See Report and Order*, 7 FCC Rcd at 689.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
	)	DA 93-1544
	)	
BellSouth Corporation's	)	AAD 92-89
Permanent Cost Allocation Manual	)	
for the Separation of Regulated	)	
and Nonregulated Costs	)	

MEMORANDUM OPINION AND ORDER

Adopted: December 23, 1993 **Released:** December 27, 1993

By the Chief, Accounting and Audits Division:

I. INTRODUCTION

1. On September 30, 1992, BellSouth Corporation filed a revision to its cost allocation manual (CAM).[1] BellSouth proposes to implement a statistical sampling process it refers to as Work Activity Statistical Sampling Process (WASSP) in place of positive time reporting for assigning certain technician expenses to accounts and cost pools. In this Order, we approve BellSouth's proposed CAM revision and permit BellSouth to implement its WASSP system.

II. BACKGROUND

2. On October 9, 1992, the Accounting and Audits Division (Division) notified BellSouth that its WASSP proposal raised serious concerns, not only as to how costs associated with operating personnel are to be allocated between regulated and nonregulated activities, but also as to how these costs are to be assigned to the appropriate Part 32 accounts.[2] The Division directed BellSouth to provide additional information about its proposed system's accuracy and to engage an independent auditor to evaluate the validity of the process. In order to allow sufficient time for the independent audit and for Division review of

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[1] A Public Notice was issued to request public comment on BellSouth's CAM revisions (File Reference AAD 92-73) on October 6, 1992, 7 FCC Rcd 6609.

[2] See e.g. Letter from Kenneth M. Ackerman, Chief, Accounting Systems Branch to Maurice P. Talbot, Jr., Director, Federal Regulatory (Oct. 9, 1992).

the audit findings, the Division has issued three stay orders.[3] The latest stay order expires on December 30, 1993.

III. BELLSOUTH'S PROPOSAL

3. BellSouth proposes to use a statistical sampling methodology in lieu of the current method of positive time reporting[4] for certain installation and maintenance technicians.[5] BellSouth states that, under the new process, random sampling techniques would be used to select technicians who would be required to report the time associated with the various work functions they perform. This information would be translated into the necessary financial information by a centralized group of analysts who would review the sampled time reports and conduct follow-up interviews with the technicians. These results would be used to record labor costs within the Part 32 accounts and within the cost pools. BellSouth believes this would simplify the time reporting process for the technicians as well as provide enhanced information to management.

IV. DISCUSSION

4. For joint activities which are labor intensive, such as the installation and maintenance activities under consideration here, an accurate time reporting system is essential to prevent cross-subsidies. As a result, we directed BellSouth to engage an independent auditor to conduct an audit of WASSP to determine the validity of the statistical techniques used in the process and to evaluate the effects of this system on the carrier's results. BellSouth engaged the firm of Deloitte and Touche to evaluate this system. Deloitte and Touche conducted an audit and concluded that the process was statistically sound, but made recommendations to improve the internal controls, documentation, and training. Division staff also directed BellSouth to make improvements to WASSP, especially to the technician interview procedures.

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[3] BellSouth Corporation's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Cost, 7 FCC Rcd 7220 (Accounting and Audits Div. 1992); BellSouth Corporation's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Cost, 8 FCC Rcd 3569 (Accounting and Audits Div. 1993); BellSouth Corporation's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 8 FCC Rcd 8409 (Accounting and Audits Div. 1993). Three stays were issued since the independent audit took longer than anticipated and Division staff needed to make sure that BellSouth had properly implemented the independent auditor's recommendations.

[4] In positive time reporting, each employee accounts for the hours worked during a given day by assigning increments of time to specific jobs or functions performed.

[5] BellSouth proposes that technicians with the following Job Function Codes (JFCs) participate in WASSP: I&M - Corporate Communications (JFC 4130), I&M - POTS (JFC 4150), I&M - Public Communications (COIN) (JFC 4180), I&M - Special Services (SSI&M) (JFC 4190), Cable Maintenance - Demand (JFC 4230), Cable Maintenance - Programmable (JFC 4240), Facility Maintenance - Programmable (JFC 4260), and Facility Maintenance - Demand (JFC 4270).

5. In December 1993, the Division's audit staff concluded its review of Deloitte and Touche's audit workpapers and performed an on-site review of WASSP and determined that BellSouth has made the necessary refinements to the process and that the process can provide reliable results. Therefore, we approve BellSouth's proposed CAM change and permit BellSouth to implement its WASSP system subject to any additional operational recommendations we may make upon final review of the staff audit. We anticipate that these recommendations will be included in a forthcoming audit letter.

6. Our approval of BellSouth's CAM revision is limited to the use of a statistical sampling method for those technician functions described in footnote 5. BellSouth must not make any changes to its WASSP system without prior notification and approval of the Commission. Further, the review of WASSP is to be made part of the overall CAM review conducted annually by the independent auditors under Part 64.904 of the Commission's rules.[6]

V. ORDERING CLAUSE

7. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), and 220 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 220 and Sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91 and 0.291, that the cost manual revision pertaining to Section VII, Time Reporting Procedures, filed September 30, 1992, by BellSouth IS APPROVED subject to the conditions in paragraphs 5 and 6 above.

FEDERAL COMMUNICATIONS COMMISSION

Kenneth P. Moran

Kenneth P. Moran
Chief, Accounting and Audits Division

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[6] 47 C.F.R. §64.904.

Before the
FEDERAL COMMUNICATIONS COMMISSION FCC 93-551
Washington, D.C. 20554

In the Matter of	)	
	)	
Review of the Pioneer's Preference Rules	)	ET Docket No. 93-266

FIRST REPORT AND ORDER

Adopted: December 23, 1993; Released: January 28, 1994

By the Commission: Chairman Hundt not participating. Commissioner Duggan issuing a statement.

INTRODUCTION

1. By this action, the Commission completes its review of the pioneer's preference rules with respect to the applicability of any changes in those rules to proceedings in which Tentative Decisions have been issued. Herein we decide to continue to apply our existing pioneer's preference rules to such proceedings and will consider the merits of the individual requests in each of the proceedings affected.[1] With respect to other proceedings, by this action we do not prejudge whether the pioneer's preference rules should be repealed, retained, or amended. We intend to address these remaining issues in a separate Report and Order.

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[1] Three proceedings are within this category. See Establishment of New Personal Communications Services, Tentative Decision and Memorandum Opinion and Order, GEN Docket No. 90-314, 7 FCC Rcd 7794 (1992) (pioneer's preferences tentatively awarded to American Personal Communications (APC), Cox Enterprises, Inc. (Cox), and Omnipoint Communications, Inc. (Omnipoint) and tentatively denied to fifty-three additional applicants in the 2 GHz broadband Personal Communications Services (PCS) proceeding); Establishment of Local Multipoint Distribution Service, Notice of Proposed Rule Making, Order, Tentative Decision and Order on Reconsideration, CC Docket No. 92-297, 8 FCC Rcd 557 (1993) (pioneer's preference tentatively awarded to Suite 12 Group (Suite 12) in the 28 GHz Local Multipoint Distribution Service (LMDS) proceeding); and Allocate Bands for Use by Mobile-Satellite Service, Notice of Proposed Rule Making and Tentative Decision, ET Docket No. 92-28, 7 FCC Rcd 6414 (1992) (no tentative pioneer's preferences awarded (five denied) in the 1.6/2.4 GHz Mobile-Satellite Service (MSS) proceeding).

BACKGROUND

2. In the Notice of Proposed Rule Making (Notice)[2] we sought comment on issues related to the effect on the pioneer's preference rules of assigning licenses by competitive bidding.[3] In that context we solicited comment on whether repeal or amendment of our pioneer's preference rules should apply to the three proceedings in which Tentative Decisions, but not final Orders, have been issued.[4]

3. In response to the Notice, American Personal Communications requested that the Commission address early and separately whether to apply to the 2 GHz broadband PCS proceeding[5] any changes or repeal of the pioneer's preference rules.[6] In its request, APC argued that applying to the broadband PCS preference applicants any changes to the rules would be unjust because these applicants have expended substantial resources in reliance on the existing preference rules. APC further argued that repeal would be unlawful because

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[2] Review of the Pioneer's Preference Rules, ET Docket No. 93-266, 8 FCC Rcd 7692 (1993).

[3] Competitive bidding authority was enacted by the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002, 107 Stat. 387 (enacted August 10, 1993) (1993 Budget Reconciliation Act). The Commission has proposed rules to implement this authority, see Implementation of Section 309(j) of the Communications Act Competitive Bidding, PP Docket No. 93-253, Notice of Proposed Rule Making, 8 FCC Rcd 7635 (1993).

[4] In the Notice, the Commission decided that any changes in the pioneer's preference rules would not be applied to proceedings in which a final Order has been adopted. There are two such proceedings. One addresses low-Earth orbit satellites that operate below 1 GHz, see Allocate Spectrum For Fixed and Mobile Satellite Services for Low-Earth Orbit Satellites, ET Docket No. 91-280, Report and Order, 8 FCC Rcd 1812 (1993). The other addresses 900 MHz narrowband PCS, see Establishment of New Personal Communications Services, GEN Docket No. 90-314 and ET Docket No. 92-100, First Report and Order, 8 FCC Rcd 7162 (1993), petitions for reconsideration and clarification pending, appeals pending sub nom. BellSouth Corp. v. FCC, No. 93-1518 (D.C. Cir. filed August 20, 1993) and Freeman Engineering Associates, Inc. v. FCC, No. 93-1519 (D.C. Cir. filed August 23, 1993).

[5] GEN Docket No. 90-314, supra note 1.

[6] Request for Separate and Expedited Treatment of "Existing Pioneer Preference" Issues, ET Docket No. 93-266, filed October 28, 1993.

Congress has not authorized the Commission to retroactively eliminate preferences.[7] APC also argued that applying the existing rules to the narrowband (900 MHz) PCS applicants[8] but not the broadband PCS applicants would be arbitrary because the different treatment would result solely from timing decisions within the Commission's own control. APC further contended that the delay in making final determinations in the broadband PCS pioneer's preference proceeding violated the Commission's rules, which require that pioneer's preference determinations be made at the same time that final rules are adopted in the associated rulemaking proceeding. APC concluded that this delay injures deserving innovators and the public and requested that we address separately on an expedited basis applying the preference rules to broadband PCS.

4. Most parties concur with APC that it would be unfair to apply any modifications to the pioneer's preference rules to the three proceedings in which Tentative Decisions have been made. For example, Henry Geller, the original proponent of the pioneer's preference rules, now supports their elimination, but nevertheless recommends retaining them for the proceedings in which Tentative Decisions have been issued as a matter of equity.[9]

5. With regard to amending or repealing the rules with respect to the 2 GHz PCS preference applicants in particular, Cox

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[7] Additionally, APC argued that applying changed rules to the pioneer's preference applicants in these pending proceedings would constitute unlawful retroactive rulemaking, citing, inter alia, Bowen v. Georgetown University Hospital, 488 U.S. 204, 208 (1988)(Bowen). Several parties concur with APC. Advanced Mobilecomm Technologies, Inc. and Digital Spread Spectrum Technologies, Inc. (AMT/DSST) states that the retroactive application of a repeal of the preference rules must ultimately meet the test of Congressional intent established in Bowen to so apply a statute (AMT/DSST at 12). Similarly, Advanced Cordless Technologies, Inc. (ACT) asserts that the 1993 Budget Reconciliation Act authorizing competitive bidding does not mandate that the Commission take action with respect to the preference rules, and that the Commission lacks authority to apply changes to the rules retroactively (ACT at 3-4). Suite 12 Group (Suite 12) contends that retroactive application of changed pioneer's preference rules to tentative preference grantees would create an adverse effect on the grantees that clearly outweighs the interests that the rules promote (Suite 12 at 17-18).

[8] See First Report and Order, GEN Docket No. 90-314 and ET Docket No. 92-100, supra note 4 (award to Mobile Telecommunication Technologies Corporation) (Mtel).

[9] Geller at 6.

expresses agreement with APC that it would be arbitrary for the Commission to treat the 2 GHz PCS preference applicants differently from the 900 MHz PCS applicants solely because the Commission bifurcated its PCS proceeding and reached conclusions on narrowband issues first. Cox argues that depriving the 2 GHz tentative preference holders of the benefit of their investments will discourage future investment in technical research and erode future confidence in the Commission's commitment to its rules. Further, Cox argues that equity requires that the applications of the PCS pioneer applicants be evaluated consistent with the existing rules.[10] Rockwell International Corporation (Rockwell) concurs that equity requires the 2 GHz PCS preference applications be evaluated on their merits in view of the final order issued with regard to 900 MHz PCS. Rockwell states that 900 MHz and 2 GHz PCS are part of the same proceeding and treating applicants differently merely because of the timing of decisions would be arbitrary.[11] AMT/DSST argues that 2 GHz PCS preference applicants have expended significant efforts and resources, and that repealing the preference rules with respect to these applicants would be inequitable because the public has benefitted from the collective experimentation performed.[12]

6. We have issued Tentative Decisions in two proceedings in addition to 2 GHz PCS. With respect to the 28 GHz LMDS proceeding in which we tentatively awarded a pioneer's preference to Suite 12 Group, Suite 12 argues that if the Commission decides to eliminate or alter significantly the pioneer's preference rules, equity demands that the tentative grants, including that for LMDS, be judged in accordance with the existing rules.[13] With respect to the 1.6/2.4 GHz MSS proceeding in which we tentatively decided that no pioneer's preference award was merited, Motorola Satellite Communications, Inc. (Motorola) argues that there is no reason to change the preference rules as they apply to this proceeding. Motorola states that the recent authorization of competitive bidding does not undermine the basis of the Commission's decision to consider pioneer's preference requests in the 1.6/2.4 GHz MSS proceeding because the MSS applications are not mutually exclusive.[14]

7. Other parties, however, argue that it would be permissible for the Commission to apply modifications to the pioneer's preference rules to existing proceedings. Nextel

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[10] Cox at 8.

[11] Rockwell at 3.

[12] AMT/DSST at 12.

[13] Suite 12 at 15-16.

[14] Motorola at 8.

Communications, Inc. (Nextel) states that the 2 GHz PCS tentative selectees are not entitled to final preferences simply because the Commission made them tentative selectees. Nextel maintains that under the notice and comment rule making procedures involved, the Commission is free to revise, modify, and even reverse its tentative conclusions based on the record developed in response to its solicitation for comments.[15] Paging Network, Inc. (PageNet) states that under established legal precedent, the Commission has the authority to change the eligibility rules to the detriment of pending applications.[16] PageMart, Inc. (PageMart) asserts that Congress has made clear that the Commission has broad discretion to modify the preference rules in light of competitive bidding authority, including the discretion to change the nature of the award or the conditions precedent for receipt of the award.[17]

8. Some parties also argue that if licensees generally will be selected using competitive bidding it would be more equitable to charge pioneers in proceedings in which Tentative Decisions have been made. BellSouth states that whether the preference policy is eliminated or modified, the narrowband and broadband PCS grantees should pay competitive bidding prices. BellSouth notes that Congress specifically provided that competitive bidding could apply to pending applications as well as those not yet filed.[18] PageMart contends that preferences were not intended to result in a financial windfall and argues that other licensees will be disadvantaged by a preference grantee's ability to capitalize on the earlier certainty of its license and further handicapped if they are forced to shoulder a financial burden that is not imposed on the preference grantees with whom they compete.[19] Finally, Southwestern Bell Corporation (SBC) maintains that preference grantees should pay a price equivalent to that paid by those obtaining their license at auction prices because compensation to the public should be required for use of the spectrum.[20]

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[15] Nextel reply comments at 6-7.

[16] PageNet at 9, citing United States v. Storer Broadcasting Co., 351 U.S. 192 (1956).

[17] PageMart at 6, citing the 1993 Budget Reconciliation Act, § 6002(a); H.R. Conf. Rep. No. 103-213, 103rd Cong., 1st Sess., at 485 (1993).

[18] BellSouth at 13-14, citing the 1993 Budget Reconciliation Act, § 6002(e).

[19] PageMart at 6.

[20] SBC at 5-6.

DISCUSSION

9. We conclude that it would be inequitable to apply any changes in our rules to pending proceedings in which Tentative Decisions have been issued.[21] Notwithstanding that other licensees in the three proceedings at issue may have to pay for their licenses,[22] preference applicants in these proceedings have submitted their requests and publicly disclosed substantial detail of their system designs in reliance on the continued applicability of the pioneer's preference rules.[23] We have evaluated their requests based on existing rules and issued Tentative Decisions, and parties have expended not inconsiderable resources to further argue the merits or demerits of the requests and our tentative conclusions addressing the requests. Had the rules been different, these applicants might have structured their requests differently; or conducted research, development, and experimentation differently; or elected not to disclose detailed information about their systems. We conclude that notwithstanding our legal authority to treat 2 GHz broadband PCS pending applicants differently than the 900 MHz narrowband PCS pioneer (Mtel) and also to apply changed rules prospectively to pending applicants in the 28 GHz LMDS and 1.6/2.4 GHz MSS proceedings,[24] to do so would be inequitable in these three

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[21] We previously determined that, as a matter of equity, nothing in our pioneer's preference review will affect the narrowband PCS proceeding and we adhere to that decision. See Notice at para. 18.

[22] However, as noted by Motorola, competitive bidding may not apply to the 1.6/2.4 GHz MSS proceeding if license applications are determined not to be mutually exclusive.

[23] In the Notice at para. 10 comment was requested on whether we legally are permitted to charge for a license obtained through the pioneer's preference process if a license continues to be guaranteed. Without reaching that statutory issue, in the Notice at para. 18 and footnote 19 we agreed not to apply any rules changes in the two proceedings in which final decisions had been issued, and herein agree to extend the same treatment to the three proceedings in which Tentative Decisions had been issued. Declining to apply possible changes in our rules to all of these proceedings includes declining to levy charges based upon competitive bids as determined by other methods, as suggested by BellSouth, PageMart, and SBC, supra para. 8.

[24] The Commission legally may modify the rules applicable to applicants and proceedings in which final decisions have not been made. Applying modifications to the pioneer's preference rules prospectively to pending pioneer's preference requests would not constitute retroactive rulemaking. See Bowen 488 U.S. at 219-220 (J. Scalia concurring) (rules are retroactive if they "alter the

proceedings. Accordingly, we will render final decisions on pioneer's preference requests in these proceedings based on the existing pioneer's preference rules. Further, we concur with APC that it is in the public interest to reach an early decision in the 2 GHz broadband PCS pioneer's preference proceeding. Therefore, we today are taking final action in that proceeding.[25]

CONCLUSION

10. This action concludes our review of the pioneer's preference rules with respect to proceedings in which Tentative Decisions have been made. We anticipate concluding our review of the pioneer's preference rules with respect to other proceedings in a separate Report and Order.

Ordering Clause

11. Accordingly, IT IS ORDERED that this First Report and Order IS ADOPTED. IT IS FURTHER ORDERED that the Request for Separate and Expedited Treatment of "Existing Pioneer Preference" Issues, filed by American Personal Communications, IS GRANTED to the extent indicated herein. This action is taken pursuant to

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past legal consequences of past actions" or "change what the law was in the past," not simply because they "affect" past transactions (emphasis in original); Association of Accredited Cosmetology Schools v. Alexander, 979 F.2d 859, 864 (D.C. Cir. 1992) (a rule is retroactive only if it "takes away or impairs vested rights acquired under existing law, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past"); Chemical Waste Management, Inc. v. EPA, 869 F.2d 1526, 1536 (D.C. Cir. 1989) (the fact that a rule change results in "expectations [being] frustrated" does not make it retroactive). It also is well-established that new rules affecting eligibility can be applied to pending applicants. See Hispanic Info & Tel. Network, Inc. v. FCC, 865 F.2d 1289 (D.C. Cir. 1989).

[25] See Third Report and Order, GEN Docket No. 90-314, FCC 93-550, adopted December 23, 1993 (pioneer's preferences awarded to APC, Cox, and Omnipoint and denied 47 additional applicants).

Sections 4(i), 7(a), 303(c), 303(f), 303(g), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 157(a), 303(c), 303(f), 303(g), 303(r), and 309(j).

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Separate Statement
of
Commissioner Ervin S. Duggan

Re: Review of the Pioneer's Preference Rules, ET Docket No. 93-266, First Report and Order; Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Docket No. 90-314 et al., Third Report and Order.

It is no secret that I have long been a skeptic about the wisdom of the FCC's pioneer's preference policy. In this review docket, which sought to confront concerns about whether the pioneer's preference policy made sense in connection with our new auction authority, the proponents of pioneer's preferences have convinced me that the policy has indeed spurred innovation and investment in new technology. I therefore support retaining the pioneer's preference policy, at least for existing tentative selectees. If sparingly awarded, such preferences should help generate the technological innovation that the Commission hoped for when it created the policy.

I always granted that the pioneer's preference policy was noble in concept. My concerns have been limited to the practical difficulties that could arise in implementing the policy. At the outset, I identified several potential dangers: the danger of politicizing awards; the danger of making difficult, hair-splitting decisions about what constitutes true innovation; and finally, the danger of being caught up in endless litigation, which obviously might slow, rather than speed, the commercial advent of new technologies.[1]

The commenters in this proceeding and our actual experience, however, suggest to me that the benefits of the pioneer's preference policy outweigh the dangers it may threaten, at least with respect to those proceedings in which the FCC already has reached tentative or final decisions. And I grant that a decision to award preferences here is true to the expectations that the Commission created when it established the pioneer's preference scheme: that innovators would be rewarded with the grant of a license enabling them to use and profit from their innovations.

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[1] See Amendment of the Commission's Rules to Establish New Personal Communications Services (GEN Docket No. 90-314), Tentative Decision and Memorandum Opinion and Order, 7 FCC Rcd 7794, 7815 (1992); Establishment of Procedures to Provide a Preference to Applicants Proposing an Allocation for New Services (GEN Docket No. 90-217), Report and Order, 6 FCC Rcd 3488, 3500 (1991).

I do want to emphasize, however, that pioneer's preferences should, in my judgment, be awarded in a most austere and sparing fashion. Nobel prizes would be devalued if they were too easily won. So too, pioneer's preferences should be granted only to those who cross a high threshold; otherwise their meaning and purpose will be diluted. A conservative approach to such awards also should minimize the dangers that I identified when first we embarked on this enterprise.

# # # #

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Transport Rate Structure and Pricing	)	CC Docket No. 91-213
	)	
	)	

SECOND REPORT AND ORDER

Adopted: January 19, 1994 Released: January 31, 1994

By the Commission: Commissioner Duggan concurring in the result and issuing a separate statement.

Table of Contents

Paragraph Number

I. INTRODUCTION 1

A. Summary 1
B. Background 3

II. DISCUSSION 7

A. Baskets 7
B. Service Categories and Subcategories 16
C. Bands 26
D. Implementation Procedure 37

III. CONCLUDING MATTERS 39

A. Conclusion 39
B. Regulatory Flexibility Act Analysis 40
C. Ordering Clauses 41

I. INTRODUCTION

A. Summary

1. By this order, we modify certain features of the price cap regulatory system applicable to local exchange carriers (LECs) to complement our recent restructure of the LECs' local

transport rates.[1] The order limits the price cap LECs' ability to offset lower rates for more competitive services with higher rates for less competitive services. These rule changes, together with the recent transport rate restructure, advance our objective of stimulating economic growth by encouraging the LECs to align their transport rates to reflect more closely how costs are incurred. As a result, our actions should promote more efficient usage and deployment of the country's telecommunications networks, advance competition in both the long-distance and local access markets, and ultimately reduce access charges and long-distance rates, thus stimulating the economy by increasing demand for these services.

2. We are moving transport services, including all the transmission-related elements, the tandem switching charge, and the interconnection charge, out of the price cap basket for traffic sensitive services, and are placing them into a combined "trunking" basket containing transport and special access services. We are realigning the service categories and subcategories within the trunking basket to reflect the similarities between certain special access and flat-rated transport services, and to accommodate the new density zone pricing system that we adopted for both special access and transport. In addition, we adapt the pricing bands applicable to the service categories and subcategories in a manner that will adequately continue to constrain LECs' changes in rates and rate relationships, while giving the LECs a fair degree of pricing flexibility.

B. Background

3. In 1990, we adopted a system of price cap regulation for LECs, which currently applies to most of the larger LECs, to

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[1] Transport Rate Structure and Pricing, CC Docket No. 91-213, Report and Order and Further Notice of Proposed Rulemaking, 7 FCC Rcd 7006 (1992) (appropriate sections cited as Transport Order and Further Notice), recon., First Memorandum Opinion and Order on Reconsideration, 8 FCC Rcd 5370 (1993) (First Reconsideration Order), recon., Second Memorandum Opinion and Order on Reconsideration, FCC 93-403 (released August 18, 1993) (Second Reconsideration Order), pets. for recon. pending, appeal dismissed sub nom. New England Tel. and Tel. Co. v. FCC, No. 93-1494 (D.C. Cir. Sept. 7, 1993), pet. for review pending sub nom. Full Service Computing Corp. v. FCC, No. 93-1670 (D.C. Cir., filed Oct. 4, 1993). Transport is a component of interstate switched access, which LECs provide to enable interexchange carriers (IXCs) and other customers to originate and terminate interstate switched telecommunications traffic. Transport constitutes the local transmission between customer points of presence (POPs) and LEC end offices, where local switching occurs.

create incentives for these LECs to improve their productivity and to offer new services.[2] The price cap system constrains the aggregate price levels of LEC services grouped in each of four baskets -- common line, traffic sensitive, special access, and interexchange -- through limitations on maximum aggregate prices for each basket, and through tariffing practices that allow streamlined filing of rates that fall within pricing bands. Within these baskets, services are grouped into separate service categories, each of which has its own pricing constraints, which limit the LECs' ability to offset increases in the prices of certain services within a basket by reducing the prices of other services in the basket.[3] Currently, there are seven service categories within the traffic sensitive basket,[4] and four service categories and two subcategories within the special access basket.[5] In general, the price cap constraints applicable to the baskets and service categories permit the LECs to change their rates to reflect more economically efficient cost allocations and underlying cost changes, but avoid precipitous price changes and prevent LECs from disadvantaging one class of ratepayers to the benefit of another class.[6]

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[2] Policy and Rules Concerning Rates for Dominant Carriers, Second Report and Order, CC Docket No. 87-313, 5 FCC Rcd 6786 (1990) (LEC Price Cap Order), recon., 6 FCC Rcd 2637 (1991), further recon., 6 FCC Rcd 4524 (1991), second further recon., 7 FCC Rcd 5235 (1992), aff'd sub nom. National Rural Telecom Ass'n v. FCC, 988 F.2d 174 (D.C. Cir. 1993). See generally 47 C.F.R. §§ 61.41-61.49.

[3] Streamlined tariff procedures apply to LEC rate changes that are below the price cap index (PCI) levels for the basket and within the service category bands. By contrast, LECs must file cost support to justify rate changes that fall outside the constraints applicable to baskets or service categories.

[4] The service categories within the existing traffic sensitive basket are: (1) local switching, (2) information, (3) database access, (4) billing name and address, (5) direct-trunked transport, entrance facilities, and dedicated signalling transport, (6) tandem-switched transport, and (7) the interconnection charge. The last three of these were established in the Transport Order and are discussed infra, ¶ 4.

[5] The four service categories within the existing special access basket are: (1) voice grade, WATS, metallic, and telegraph; (2) audio and video; (3) high capacity and digital data service (DDS); and (4) wideband data and wideband analog.

[6] LEC Price Cap Order, 5 FCC Rcd at 6811, ¶ 198.

4. In the Transport Order, we required the LECs to restructure their existing transport services, which in the past were offered based on an equal charge per unit of traffic. We adopted an interim rate structure consisting of flat-rate charges for entrance facilities, direct-trunked transport, and dedicated signalling transport, and per-minute charges for tandem-switched transport and the interconnection charge.[7] We adopted a number of pricing rules, generally requiring that initial rates for entrance facilities, direct-trunked transport, dedicated signalling transport, and tandem-switched transport be set on the basis of special access rates, while the interconnection charge initially is to be priced on a residual basis. The LECs filed tariffs implementing the transport rate restructure on September 1, 1993, which became effective on December 30, 1993.[8]

5. We created three new service categories in the traffic sensitive basket in the place of the formerly bundled transport service category: (1) an aggregated category including entrance facilities, direct-trunked transport, and dedicated signalling transport (collectively referred to as "flat-rated transport"); (2) tandem-switched transport; and (3) the interconnection charge. The flat-rated transport service category is subject to upper and lower bands of 5%. The tandem-switched transport service category is subject to an upper band of 2% and a lower band of 5%.[9] The interconnection charge service category has an upper band of 0%.[10]

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[7] Entrance facilities constitute transmission between the IXC's point of presence (POP) and the LEC office serving that POP, called a serving wire center (SWC). Direct-trunked transport is transmission of traffic between the LEC SWC and a LEC end office, or between any two customer-designated LEC offices, that requires no tandem switching. Tandem-switched transport is transmission of traffic between the SWC and an end office, or between a tandem office and an end office, that is switched at a tandem. The interconnection charge is usage-sensitive and is to be paid by all interstate access customers that interconnect with the LEC switched access network. Dedicated signalling transport is transport between IXCs' common channel signalling networks and LECs' signalling transfer points (STPs).

[8] See Local Exchange Carrier Switched Local Transport Restructure Tariffs, DA 93-1579 (Com. Car. Bur., released Dec. 29, 1993).

[9] Transport Order, 7 FCC Rcd at 7043-44, ¶¶ 74-76. In general, percentage limitations on changes in aggregate rate levels within service categories are relative to changes in the PCI for the basket.

[10] Id., 7 FCC Rcd at 7046, ¶¶ 81-82.

6. In the Special Access Expanded Interconnection Order, we adopted a system of density zone pricing, under which LECs' rates for high capacity special access services (and other services found to be subject to competition) could diverge gradually in different geographic zones over time.[11] We implemented this system for price cap LECs by creating new zone subcategories within the DS3 and DS1 subcategories. Rate changes within the zone subcategories are constrained by upper bands of 5% and lower bands of 10%. In the Phase I Switched Expanded Interconnection Order, we created a similar density pricing zone system for transport, and created new zone subcategories, with analogous 5% upper and 10% lower bands, within the flat-rated transport and tandem-switched transport service categories.[12] We concluded in the Phase I Switched Expanded Interconnection Order that the same density pricing zones should apply to both special access and switched transport.[13]

II. DISCUSSION

A. Baskets

7. Notice. In the Further Notice, we proposed to place special access and transport services into a single basket.[14] We sought comment on whether the tandem switching element should be included in the proposed combined transport and special access basket, or whether it should be placed in a separate category in the basket that includes services such as local switching.[15] We also sought comment on whether the interconnection charge should

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[11] Expanded Interconnection with Local Telephone Company Facilities, Report and Order, CC Docket No. 91-141, 7 FCC Rcd 7369, 7451-57, ¶¶ 172-84 (1992) (Special Access Expanded Interconnection Order), recon., Memorandum Opinion and Order, 8 FCC Rcd 127 (1992), recon., Second Memorandum Opinion and Order on Reconsideration, FCC 93-378 (released Sept. 2, 1993), pets. for recon. pending, appeal pending sub nom. Bell Atlantic Corp. v. FCC, No. 92-1619 (D.C. Cir., filed Nov. 25, 1992).

[12] Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141, Transport Phase I, Second Report and Order and Third Notice of Proposed Rulemaking, FCC 93-379, ¶¶ 98-101, 104, 109-12 (released Sept. 2, 1993) (Phase I Switched Expanded Interconnection Order).

[13] Phase I Switched Expanded Interconnection Order, ¶ 104.

[14] Further Notice, 7 FCC Rcd at 7067, ¶ 143.

[15] Further Notice, 7 FCC Rcd at 7067, ¶ 143.

be in a separate basket by itself or should be included in the traffic sensitive basket with local switching and information.[16]

8. Positions of the Parties. The LECs generally support putting transport and special access into the same basket, to enable LECs to maintain economically rational relationships among rates for similar services.[17] USTA and several LECs support realigning the LEC price cap system to create four baskets: (1) switching, including local switching, tandem switching, signalling and database services; (2) transport, including special access and transport; (3) public policy, including Lifeline, Universal Service Fund, the end user common line charge, the carrier common line charge (or a substitute recovery mechanism), Long Term Support, the interconnection charge, and any other elements established for public policy purposes; and (4) other, including interexchange and any other elements that do not fit into the foregoing baskets.[18]

9. Several LECs argue that tandem switching should be included in the local switching basket, or that tandem switching costs should be recovered through a combined switching element.[19] Sprint agrees, noting LEC arguments that it is difficult to separate the costs of dual-use switches between end office and tandem functionality and that tandem switches benefit all customers by providing multiple routing that enhances network reliability and efficiency.[20] On the other hand, AT&T and U S West argue that the tandem switching charge should be placed in the proposed combined transport and special access basket because it is a necessary adjunct to tandem-switched transport, and because placing the

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[16] Further Notice, 7 FCC Rcd at 7067, ¶ 144.

[17] Ameritech Comments at 13; BellSouth Comments at 24-25; GTE Comments at 38-39; NYNEX Comments at 43-48; Pacific Comments at 43-44; U S West Comments at 22-23; USTA Comments at 38-41; Rochester Reply Comments at 4-5.

[18] USTA Comments at 38-41; USTA Reply Comments, App. A at 13-22, 27-28; Pacific Comments at 44-46; SW Bell Comments at 75-77; U S West Comments at 38-41; GTE Reply Comments at 19-20; NYNEX Reply Comments at 26-27; SW Bell Reply Comments at 7; Rochester Reply Comments at 4-7. USTA also advocates creating similar access categories in Part 69 for rate-of-return LECs. USTA Comments at 41-42.

[19] See comments cited in preceding footnote; NYNEX Comments at 48 (also proposes new tandem port connection charges, to be included in basket with local switching); Rochester Reply Comments at 12-13; United Reply Comments at 5; NTCA Reply Comments at 8.

[20] Sprint Reply Comments at 6-7.

tandem charge in the switching basket would create opportunities for improper cross-subsidization.[21]

10. NYNEX argues that, pending a comprehensive review to establish a "public policy" basket, the interconnection charge should remain in the existing traffic sensitive basket in a separate service category, which would enable LECs to reduce the interconnection charge over time through adjustments in other traffic sensitive rates.[22] Sprint agrees that the interconnection charge should remain in the traffic sensitive basket.[23]

11. The medium and small IXCs advance proposals for the regulation of ongoing transport rate changes that would be more restrictive than changes contemplated within the current price cap system. MCI contends that the existing DS3 and DS1 special access rate relationships are facially discriminatory and have never been aligned with costs, and that a comprehensive cost study is needed to re-initialize transport rates.[24] Several IXCs argue that LEC rates for DS3 and DS1 flat-rated transport should be subject to permanent, ongoing benchmark rules, with a required relationship in the range of 22-to-1 to 24-to-1 that would apply separately to interoffice and entrance facilities.[25] CompTel and WilTel assert that tandem-switched transport rates should also be linked to the rates for the highest capacity service operating in the interoffice network (i.e., volume-discounted DS3).[26] These parties argue that such rules would encourage more efficient use of high capacity facilities and prevent discrimination. The LECs and AT&T generally oppose regulatory constraints on LECs' DS3-to-DS1 relationships, arguing that mandated rate relationships are not cost-justified and

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[21] AT&T Comments at 30-31; U S West Comments at 22-23. See also Minnesota Equal Access Reply Comments at 2-10 (opposing proposals to recover tandem-related costs through local switching charges as non-cost-causative and impeding competition in the market for provision of tandem-switched transport service).

[22] NYNEX Comments at 48.

[23] Sprint Comments at 26.

[24] MCI Comments at 31.

[25] CompTel Comments at 15-17; Sprint Comments at 16-17; WilTel Comments at 37-43; LCI Comments at 5; LDDS Comments at 6.

[26] CompTel Comments at ___; WilTel Comments at 37-39.

would be unreasonable in a competitive market in which the LECs' competitors are not subject to such constraints.[27]

12. Discussion. We adopt our proposal to remove the transport service categories from the traffic sensitive basket and place them into a combined basket that also contains special access services. We will rename this merged basket the "trunking basket." We conclude that transport elements are more closely related to similar special access services than to local switching and the other services remaining in the traffic sensitive basket, for purposes of determining the scope of LEC pricing flexibility within the price cap rules. This determination follows logically from our conclusion in the Transport Order that "the special access rate structure and the associated pricing provide a rational framework for transport," because "special access, entrance facilities, and direct-trunked transport use essentially the same underlying facilities."[28] Moreover, moving transport services out of the traffic sensitive basket and into a basket with special access services will prevent the LECs from offsetting rate reductions for transport services subject to competition with rate increases for switching and other traffic sensitive services, which are subject to much less competition at this time.

13. We are placing the tandem switching charge in the newly formed trunking basket, and keeping it in the same service category as tandem-switched transport. Local switching and tandem switching are used for different purposes in LEC networks and should remain separate. Tandem switching is a component of tandem-switched transport, and we see no reason to treat tandem switching differently than tandem-switched transport transmission elements.

14. We are placing the interconnection charge service category in the trunking basket. The revenues recovered through the interconnection charge relate to costs historically allocated to transport as a result of the Commission's separations and Part 69 cost allocation procedures. Until we have completed our evaluation of the proper disposition of the amounts recovered in

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[27] Ameritech Comments at 12-13; BellSouth Comments at 27-30; GTE Comments at 20-22; NYNEX Comments at 36-39; Cincinnati Bell Comments at 9-10; Pacific Comments at 13-19; Rochester Comments at 14-15; SW Bell Comments at 24-27; U S West Comments at 12-13; USTA Comments at 12-13; USTA Reply Comments at 20-25; Ameritech Reply Comments at 3-5; Bell Atlantic Reply Comments at 2-3; BellSouth Reply Comments at 14-16; GTE Reply Comments at 13-17; NYNEX Reply Comments at 7-14; Pacific Reply Comments at 2-5; SW Bell Reply Comments at 8-10; U S West Reply Comments at 6-9; Rochester Reply Comments at 11-12; AT&T Comments at 22-23; AT&T Reply Comments at 19-23.

[28] Transport Order, 7 FCC Rcd at 7028, 7034, ¶¶ 42, 53.

the interconnection charge, we conclude that the interconnection charge service category should be included in the trunking basket with the other transport categories.

15. In general, price cap regulation permits incremental changes based on existing special access rate levels. By contrast, the ongoing benchmark ratio requirements suggested by the small and medium IXCs would essentially mandate that the LECs' rates for DS3 and DS1 flat-rated transport, and possibly also tandem-switched transport, move in lock-step. In other words, any rate reductions for DS3 would have to be matched by equivalent rate reductions for DS1 and possibly also tandem-switched transport. We recognize these IXCs' concerns regarding changes in rate relationships, and are adopting measures that we conclude reasonably address these concerns.[29] On the other hand, we decline to require the LECs to maintain permanent, ongoing rate relationships. First, the record does not support adoption of permanent rate relationships for all price cap LECs. Moreover, it appears that requiring the LECs to lower DS1 (or tandem-switched transport) rates whenever they lower DS3 (or DS1) rates would discourage the LECs from lowering DS3 and possibly also DS1 rates.[30] A measure that discourages the LECs from reducing high-capacity transport rates, and thus limits reductions in access charges for IXCs that use high-capacity services, would in turn be likely to retard long-distance price reductions, depress telecommunications usage, and ultimately restrict economic growth. Finally, imposing such requirements on LECs while their non-dominant competitors' rates are not similarly restricted could inhibit the full development of access competition, deny opportunities to consumers, lead to a waste of resources, and inhibit economic growth.

B. Service Categories and Subcategories

16. Notice. Within the combined special access and transport basket proposed in the Further Notice, we proposed six service categories: the four existing service categories in the special access basket; the flat-rated transport and the tandem-switched transport service categories.[31]

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[29] See infra ¶¶ 21-23, 33.

[30] Pursuant to the price cap restructure rules, lower rates for any facilities-based service in the initial transport rate restructure would automatically produce a higher interconnection charge, to retain revenue neutrality to the LECs. Thereafter, by contrast, reducing DS3, DS1, or tandem-switched transport rates will not permit LECs to raise the interconnection charge.

[31] Further Notice, 7 FCC Rcd at 7067, ¶ 143.

17. Positions of the Parties. USTA and the LECs supporting its access charge reform proposal argue that within each of the four baskets that they propose creating, there should be a service category of services in geographical areas for which competition has yet to develop, with relatively narrow bands (but still broader than current price cap rules allow). Separate service categories with broader bands would cover services offered in separate geographic areas where a moderate degree of competition has developed. Services in highly competitive market areas would be outside price caps. Elements in the public policy basket would be managed individually.[32]

18. Several of the LECs argue that as all access services become subject to competition, there will be no need for separate service categories within the proposed trunking basket to separate competitive services from less competitive services, and assert that separate service categories unduly limit LEC pricing flexibility.[33] Certain other LECs support creating only two service categories within the trunking basket, for more competitive and less competitive services, to facilitate increased pricing flexibility for the former.[34] NYNEX argues that flat-rated transport services should be incorporated into the corresponding service categories within the special access basket, because rate levels for similar special access and transport services will be the same, both will be subject to similar competitive pressures, and such treatment would allow direct-trunked rates to conform to special access zone density pricing plans.[35]

19. CompTel opposes the suggestion of some LECs that a single price cap basket, with no separate service categories, should apply to all transport services, because it argues this would permit cross-subsidization and loading of excessive costs on tandem-switched transport users. Instead, CompTel supports keeping

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[32] USTA Comments at 38-42; USTA Reply Comments, App. A at 13-22, 27-28; Pacific Comments at 44-46; SW Bell Comments at 75-77; U S West Comments at 38-41; GTE Reply Comments at 19-20; NYNEX Reply Comments at 26-27; SW Bell Reply Comments at 7; Rochester Reply Comments at 4-7. USTA also advocates streamlining certain filing requirements, eliminating both high-end and low-end sharing, and creating access categories in Part 69 for rate-of-return LECs similar to the price cap baskets it proposes.

[33] Ameritech Comments at 13-14; Ameritech Reply Comments at 5-6; BellSouth Comments at 24-25, 50; BellSouth Reply Comments at 13; SW Bell Comments at 72-74; SW Bell Reply Comments at 5-6; U S West Comments at 22-23; USTA Comments at 38-39.

[34] GTE Comments at 38-39; NYNEX Comments at 43-46.

[35] NYNEX Comments at 47-48.

direct-trunked transport and tandem-switched transport in separate categories.[36]

20. In comments filed in this docket before the adoption of the Phase I Switched Expanded Interconnection Order, most of the parties favor adoption of density zone pricing for transport, but do not make detailed proposals for the manner in which transport density pricing zone subcategories should function in relation to the existing zone subcategories for DS3 and DS1 special access, given our proposal to combine transport and special access in a single basket. Some of the LECs oppose application of separate subindexes to services in separate density pricing zones.[37]

21. Discussion. We are adopting a modified version of our proposal in the Further Notice on the arrangement of service categories within the newly formed trunking basket. We conclude that flat-rated transport (entrance facilities, direct-trunked transport, and dedicated signalling transport) should be incorporated into the corresponding special access service categories, as NYNEX suggests. Thus, demand for voice grade flat-rated transport will be assigned to the existing voice grade-WATS-metallic-telegraph service category in the current special access basket for the purposes of computing the service band index (SBI) and pricing bands for that category. Demand for DS1 and DS3 flat-rated transport will be assigned, respectively, to the DS1 and DS3 subcategories of the high capacity-DDS service category in the current special access basket for purposes of computing the SBIs and bands for those subcategories.[38] Tandem-switched transport (including the tandem switching element) and the interconnection charge will be separate service categories in the trunking basket.

22. Incorporating the various flat-rated transport service offerings into the corresponding special access service categories will have a number of beneficial effects. First, given our recognition that LECs provide flat-rated transport and special access over similar facilities, it is reasonable to group these services in the same service categories. Second, we conclude that this treatment will constrain the ongoing relationship between DS3 and DS1 flat-rated transport and special access rates in a manner that is consistent with the manner in which the price cap system currently constrains DS3 and DS1 special access rate

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[36] CompTel Reply Comments at 22.

[37] Pacific Comments at 47-48; Rochester Comments at 18-19; United Comments at 2-3.

[38] See infra ¶¶ 31-34 for a discussion of the mechanics of this shift. See also Appendix B, 47 C.F.R. §§ 61.42(e)(2) & 61.47(h).

relationships.[39] Just as with DS3 and DS1 special access, the LECs' ability to offset lower DS3 flat-rated transport rates with higher DS1 flat-rated transport rates will be constrained. As a result, LECs can make only gradual changes to their current DS3-to-DS1 rate relationships.

23. We disagree with the suggestions of some LECs that no separate service categories are needed within the new trunking basket, or that only two service categories should be created for competitive and non-competitive services. In this proceeding, we are merely modifying certain elements of the LEC price cap system to accommodate the transport rate restructure; we are not undertaking a comprehensive reform of our access charge system at this time. We believe it would be premature to relax the constraints included in the system of LEC price cap regulation to the extent suggested by these LECs.[40]

24. We conclude that the density pricing zone subcategories within the flat-rated transport service category should be incorporated into the existing zone subcategories within the existing DS3 and DS1 special access subcategories, with one exception that is discussed in the following paragraph. Given our decision to place voice grade, DS1, and DS3 flat-rated transport into the existing voice grade, DS1, and DS3 special access service categories and subcategories, it is consistent to consolidate the density zone pricing subcategories within special access and flat-rated transport. This treatment will reduce the number of separate bands applicable to zone subcategories, and thus simplify the administration of density pricing zone plans for special access and transport.

25. In some cases, however, a LEC might implement density zone pricing for transport in a different tariff year than it implemented density zone pricing for special access.[41] In such

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[39] Flat-rated transport and special access services will be subject to similar competitive pressures, and could be subject to arbitrage if priced substantially differently.

[40] USTA has submitted a separate petition for rulemaking regarding its access reform proposal. See Reform of the Interstate Access Charge Rules, Petition for Rulemaking of the United States Telephone Association, RM-8356 (filed Sept. 17, 1993).

[41] For example, interconnectors in a certain study area might purchase an expanded interconnection cross-connect element for special access between July 1993 and June 1994, but might not take an expanded interconnection cross-connect for switched access until after July 1994. LECs may implement density zone pricing for special access or transport only after an interconnector has taken the expanded interconnection cross-connect element for special or

circumstances, we will require LECs to retain separate zone bands for special access and flat-rated transport services until the end of the tariff year following the tariff year in which density pricing was implemented for the later service.[42] After that time, we believe that the zone bands for special access and transport can be consolidated without substantial interference with our expectations regarding the pace of rate divergence under density zone pricing.

C. Bands

26. Notice. We proposed to apply the same 5% upper and lower bands to the four existing special access service categories and the flat-rated transport service category that currently apply, and to apply the same 2% upper and 5% lower bands to the tandem-switched transport service category.[43] We generally sought comment on the appropriate rate relationships for transport, and on whether zone pricing would help ensure that appropriate transport rate relationships are maintained, while enabling LECs to respond adequately to increased competition.[44]

27. Positions of the Parties. The LECs generally argue for wider pricing bands, particularly for services subject to competition. Several LECs support 5% upper and 10% lower bands for less competitive services (or services in less competitive geographic areas); 5% upper and 15% lower bands for services subject to more competition; and no price cap bands for services subject to vigorous competition.[45] BellSouth argues for a 5% upper and 15% lower band for the entire special access and transport basket;[46] Rochester supports a 10% upper and 10% lower band for the

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switched access, respectively. In such a case, the LEC could implement special access density zone pricing in the July 1993-June 1994 tariff year, but could not implement transport density zone pricing until the subsequent tariff year.

[42] See Appendix B, 47 C.F.R. § 61.48(i).

[43] Further Notice, 7 FCC Rcd at 7067, ¶ 144.

[44] Id., 7 FCC Rcd at 7059-60, ¶¶ 123-24.

[45] USTA Comments at 41; GTE Comments at 39; Pacific Comments at 46; SW Bell Comments at 75-77. See also NYNEX Comments at 48-49; U S West Comments at 23; comments cited supra note 17.

[46] BellSouth Comments at 24-25, 52-53; BellSouth Reply Comments at 13.

basket.[47] United proposes 20% upper and lower bands for rate changes in different zones, which it argues would give LECs more upward flexibility to raise rates toward cost in high cost zones while not requiring them to forego cost-based decreases in low cost zones.[48]

28. NYNEX and AT&T support 5% upper and lower bands for tandem-switched transport, arguing that different transport categories should not be treated differently in the long term transport pricing system.[49] WilTel, however, argues that the tandem charge service category should be subject to a 0% upper band and no price floor, which would prevent discrimination against tandem-switched transport users, and would be consistent with LECs' claims that they are decreasing their tandem switch investment.[50] If its proposals regarding benchmarking were adopted, WilTel would support permitting unlimited decreases and increases of 5% within particular zones.[51]

29. Sprint and WilTel argue that the rates for each element of direct-trunked transport and tandem-switched transport should be tied together on an ongoing basis within each zone, in order to continue to preserve existing rate relationships and protect interexchange competition.[52] Sprint asserts that zone pricing would facilitate a higher ratio for denser areas employing mostly or all fiber, and suggests employing different ratios for different zones.[53] WilTel also supports the use of different zones for entrance facilities and interoffice facilities.[54]

30. The LECs and AT&T oppose additional restrictions on the development of zone pricing and oppose linkage between direct-trunked and tandem-switched transport rates, arguing that the proposals of the IXCs other than AT&T are not consistent with

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[47] Rochester Comments at 18-19.

[48] United Comments at 5-8.

[49] NYNEX Comments at 49; AT&T Comments at 31-32.

[50] WilTel Comments at 54.

[51] WilTel Comments at 48-49; WilTel Reply Comments at 22.

[52] Sprint Comments at 22-23, 26; WilTel Comments at 43-46; WilTel Reply Comments at 19-22. See also Allnet Comments, Expanded Interconnection with Local Telephone Company Facilities, Transport Phase I (Jan. 14, 1993), at 6-7.

[53] Sprint Comments at 17-18.

[54] WilTel Reply Comments at 20-21.

competition and that the Commission should permit normal price cap procedures to operate.[55] SW Bell asserts that the differences in the service configurations and facility arrangements between direct-trunked transport and tandem-switched transport result in quite different underlying costs, and argues that there is no reason to link tandem-switched transport rates and direct-trunked transport rates.[56] Bell Atlantic submits that WilTel's proposal would give LECs a disincentive to introduce more efficient technologies because if they did, the prices of the newest, most efficient service would be used to reduce the prices of all existing services.[57] BellSouth notes that Sprint and WilTel both appear to recognize that differing rate relationships may be appropriate in different zones.[58]

31. Ad Hoc does not oppose additional downward pricing flexibility, but opposes any expansion of the LECs' upward pricing flexibility, arguing that the LECs continue to exert near monopoly control over the interstate access market.[59] GSA supports much greater LEC pricing flexibility once switched access expanded interconnection is implemented.[60] GCI opposes expansion of LEC pricing flexibility.[61]

32. Discussion. We are not modifying the bands applicable to the transport or special access service categories at this time. The service category bands constrain the LECs' ability to offset rate reductions in some categories with rate increases in other categories. At present, we cannot be certain how the market for certain transport and special access services will develop. We are retaining the existing banding limits, although additional LEC pricing flexibility may well be appropriate in the future as competition grows more robust.

33. We recognize the concerns raised by WilTel, Sprint, and other IXCs regarding ongoing scrutiny of the relationships between different transport rates. We agree that without

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[55] USTA Reply Comments at 22; Bell Atlantic Reply Comments at 5-6; GTE Reply Comments at 17-19; AT&T Reply Comments at 20-23.

[56] SW Bell Reply Comments at 7-8.

[57] Bell Atlantic Reply Comments at 6.

[58] BellSouth Reply Comments at 14.

[59] Ad Hoc Reply Comments at 6-7.

[60] GSA Reply Comments at 6-8 (endorsing, inter alia, LEC contract pricing in response to requests for proposals).

[61] GCI Reply Comments at 4.

sufficient regulatory constraints, the LECs could take actions that might impair interexchange or local access competition.[62] For this reason, as described in detail above, we are adopting safeguards within the price cap system that constrain relationships between flat-rated and tandem-switched transport rates. Specifically, by placing DS3 flat-rated transport, DS1 flat-rated transport, and tandem-switched transport in separate service categories, and by applying separate zone bands to these service categories, we prevent the LECs from making precipitous changes in the relationships between rates for these services.[63] Moreover, by retaining the special 2% upper pricing band for tandem-switched transport, we are preserving an extra protection for this service. The arrangement of service categories in the trunking basket will constrain the LECs' ability to offset rate reductions for certain services with rate increases for other services and thus prevent possible anti-competitive behavior. On the other hand, this arrangement also gives the LECs a reasonable degree of pricing flexibility in an increasingly competitive interstate access marketplace. These measures address the concerns raised by IXCs without compromising the pro-competitive aspects of the price cap system that promote economic growth, thereby obviating the need for any permanent fixed relationships between the rates for specific services.

34. Finally, we turn to the details of establishing the indexes and banding limits for the new trunking basket and the realigned service categories within that basket. Initially, we clarify that the 2% upper and 5% lower bands for tandem-switched transport and the 0% upper band for the interconnection charge apply to changes from the initial rates for these services as of the transport rate restructure,[64] regardless of whether the LECs raised or lowered their local transport rates prior to the rate restructure. Thus, the LECs should set their initial bands and SBIs for the tandem-switched transport and interconnection charge

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[62] The LECs not only supply access services to IXCs but may also compete with them in providing long-distance services in certain circumstances, such as when Bell Operating Companies provide interstate intraLATA service in specific geographic areas. Thus, the LECs may have particular incentives to price transport services in a way that could reduce competition in long-distance services for which they compete with IXCs. We acknowledge the importance of restraining any such anti-competitive behavior and will remain vigilant as to any indication of such behavior.

[63] See supra ¶¶ 18-22.

[64] By initial rates, we refer to the rates that became effective as a result of the September 1, 1993 initial restructured transport tariff filing, or rates that subsequently go into effect as the result of the mid-course correction.

service categories using the baseline of the initial restructured rate levels.[65]

35. Because Part 61 of our rules does not explicitly address the manner in which service categories are to be merged, we adopt transition rules governing how the initial banding limits and indexes should be set for the new trunking basket and the realigned service categories within that basket. The initial degree of pricing flexibility for the trunking basket will be set by taking into account both the pricing flexibility currently available in the special access basket and the pricing flexibility available in the traffic sensitive basket (which currently includes transport). Thus, while the pre-existing actual price index (API) for the special access basket will be used as the initial API for the trunking basket, the PCI for the trunking basket should be set as follows. LECs should calculate the ratio between the pre-existing PCI for the special access basket and the API for that basket, and the ratio between the pre-existing PCI for the traffic sensitive basket and the API for that basket. A weighted average of these ratios should be derived using the base period revenue weights of the special access and transport services included in the trunking basket, respectively. This weighted average should be multiplied by the pre-existing API for the special access basket to derive the PCI for the trunking basket.[66]

36. Similarly, adjustments to the upper and lower pricing bands applicable to the existing voice grade and high capacity/DDS service categories and the DS1 and DS3 subcategories are necessary to reflect the incorporation of comparable flat-rated transport rate elements. While the SBIs for these categories are to remain the same, the upper and lower bands should reflect a weighted average of the pre-existing upper and lower bands for the special access services and the 5% upper and lower bands for the flat-rated transport services. This weighted average should be calculated using the base period revenue weights of the special access and transport services included in each service category and subcategory.[67] A comparable procedure will be used to incorporate transport services into a density pricing zone category that has

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[65] See Appendix B, 47 C.F.R. § 61.48(h)(4) and (5).

[66] See 47 C.F.R. § 61.48(h)(2). Base period demand for flat-rated transport elements (i.e., demand for the 1992 base year) should correspond with the historical demand used in computing the initial interconnection charge. The rates used in this formula should be the rates effective on the date that the transport rate restructure became effective, or rates that subsequently go into effect as the result of the mid-course correction.

[67] See Appendix B, 47 C.F.R. § 61.48(h)(3).

already been established for special access services (or vice versa).[68]

D. Implementation Procedure

37. The changes adopted in this Order necessitate adjustments to the price cap indexes. Accordingly, we direct all LECs subject to the price cap rules to recalculate their price cap indexes pursuant to the decisions in this Order. The LECs should file such recalculated indexes with the Commission in a special filing not accompanied by rate changes.[69] In addition, such recalculated indexes should be used as the basis of any price cap filing that changes rates of services in the trunking or traffic sensitive baskets.

38. Finally, we take this opportunity to clarify some miscellaneous implementation matters. First, we clarify that our decision in the Second Reconsideration Order (requiring use of historical demand for all components of the formula for computing the interconnection charge) applies only to price cap LECs. Rate-of-return LECs continue to be subject to Sections 61.38 and 61.39 of our Rules,[70] and should continue to use projected demand to set transport rates. Consistent with the First Reconsideration Order, however, these projections should only forecast demand growth, and should not attempt to forecast IXCs' reconfigurations in response to the transport rate restructure. Second, due to the difficulty of applying non-premium charges to flat-rate transport elements,[71] we modify our rules to clarify that non-premium charges must be established only for the interconnection charge, and not for the facility-based transport elements. Third, we modify our rules to clarify that the LECs must waive certain non-recurring charges for a six-month period following the effective date of their restructured transport tariffs. Finally, we are making limited technical changes to Part 69 of our Rules.

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[68] See Appendix B, 47 C.F.R. § 61.48(i).

[69] We delegate authority to the Chief, Common Carrier Bureau, to specify the format and timing of this filing.

[70] 47 C.F.R. §§ 61.38-61.39.

[71] For a more detailed description of this problem, see Petitions for Waiver of Transport Rate Structure and Pricing Requirements, DA 93-1524 (Com. Car. Bur., released Dec. 17, 1993) at ¶¶ 12-21.

III. CONCLUDING MATTERS

A. Conclusion

39. This Order will facilitate pricing that is better aligned with cost, and thus stimulate economic growth. Our actions also restrict the price cap LECs' ability to offset rate reductions for competitive services with rate increases for less competitive services, and thus promote full and fair competition in the interstate local access and interexchange markets, which should ultimately benefit consumers. We conclude that the decisions in this Order will provide a proper combination of constraints and flexibility for the pricing of transport and related services by LECs subject to price cap regulation.

B. Regulatory Flexibility Act Analysis

40. In the Further Notice, we certified that the proposed rule changes would not have a significant economic impact on a substantial number of small business entities, as defined by § 601(3) of the Regulatory Flexibility Act.[72] Neither the Chief Counsel for Advocacy of the Small Business Administration nor any commenting party disagreed with our analysis. The Secretary shall send a copy of this Report and Order, including the certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with § 605(b) of the Regulatory Flexibility Act, Pub. L. No. 69-354, 94 Stat. 1164, 5 U.S.C. §§ 601 et seq. (1981).

C. Ordering Clauses

41. Accordingly, IT IS ORDERED that pursuant to authority contained in Sections 1, 4(i) and (j), 201-205, 220, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i) and (j), 201-205, 220, and 403, Parts 61 and 69 of the Commission's rules are AMENDED as set forth in Appendix B.

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[72] Further Notice, 7 FCC Rcd at 7072-73, ¶ 158.

42. IT IS FURTHER ORDERED that the policies and rules adopted herein SHALL BE EFFECTIVE upon publication in the Federal Register.[73]

43. IT IS FURTHER ORDERED that the Chief, Common Carrier Bureau is delegated the authority specified herein.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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[73] Because the initial restructured transport rates went into effect on December 30, 1993, thus allowing LECs subject to price cap regulation to propose rate changes that do not comply with the policies adopted herein in the absence of these rule changes, good cause exists to make these rules effective less than 30 days from publication in the Federal Register.

Appendix A: List of Parties

Comments filed February 1, 1993

Ad Hoc Telecommunications Users Committee (Ad Hoc)
Allnet Communication Services, Inc. (Allnet)
American Telephone and Telegraph Company (AT&T)
Ameritech Operating Companies (Ameritech)
Bell Atlantic Telephone Companies (Bell Atlantic)
BellSouth Telecommunications, Inc. (BellSouth)
Cincinnati Bell Telephone Company (Cincinnati Bell)
Competitive Telecommunications Association (CompTel)
General Services Administration (GSA)
Great Plains Communications, Inc. (Great Plains)
GTE Service Corporation and its affiliated domestic telephone operating companies (GTE)
Illinois Commerce Commission (Illinois)
LCI Telecommunications Corporation, dba LCI International (LCI)
LDDS Communications, Inc. (LDDS)
MCI Telecommunications Corporation (MCI)
MFS Communications Company, Inc. (MFS)
Missouri Public Service Commission (Missouri)
National Association of Regulatory Utility Commissioners (NARUC)
National Exchange Carrier Association (NECA)
National Telephone Cooperative Association (NTCA)
New York Telephone Company and New England Telephone and Telegraph Company (NYNEX)
Organization for the Protection and Advancement of Small Telephone Companies (OPASTCO)
Pacific Bell and Nevada Bell (Pacific)
Rochester Telephone Corporation (Rochester) (filed late, on Feb. 8, 1993)[74]
Southwestern Bell Telephone Company (SW Bell)
Sprint Communications Co. (Sprint)
Teleport Denver Ltd. (Teleport Denver)
United States Telephone Association (USTA)
U S West Communications, Inc. (U S West)
United Telephone Companies (United)
WilTel, Inc. (WilTel)

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[74] Rochester did not request, and we do not grant, leave to file these comments out of time. We are treating these comments as an ex parte filing, but for convenience refer to them as "Rochester Comments."

Reply Comments filed March 19, 1993

Ad Hoc
Allnet
Ameritech
AT&T
Bell Atlantic
BellSouth
People of the State of California and the Public Utilities Commission of the State of California (California)
Cincinnati Bell
CompTel
Public Service Commission of the District of Columbia (D.C.)
General Communication, Inc. (GCI)
GSA
GTE
LCI Telecommunications Corporation, d/b/a LCI International (LCI)
Lufkin-Conroe Telephone Exchange, Inc.
MFS
Minnesota Equal Access Network Services, Inc. (Minnesota Equal Access)
NECA
National Rural Telecom Association (NRTA)
NTCA
NYNEX
OPASTCO
Pacific
Rochester
Sprint
SW Bell
United
U S West
USTA
WilTel

PART 61 -- TARIFFS

1. The authority citation for Part 61 continues to read as follows:

AUTHORITY: Sec. 4, 48 Stat. 1066, as amended; 47 U.S.C. 154. Interpret or apply sec. 203, 48 Stat. 1070; 47 U.S.C. 203.

2. Section 61.3 is amended by redesignating paragraphs (jj) and (kk) as paragraphs (kk) and (ll), respectively, and adding a new paragraph (jj), to read as follows:

§ 61.3 Definitions.

* * * * *

(jj) **Tariff year**. The period from the day in a calendar year on which a carrier's annual access tariff filing is scheduled to become effective through the preceding day of the subsequent calendar year.

* * * * *

3. Section 61.42 is amended by:

- removing paragraphs (e)(1)(iii), (e)(1)(iv), and (e)(1)(v);
- redesignating paragraphs (e)(1)(vi) and (e)(1)(vii) as paragraphs (e)(1)(iii) and (e)(1)(iv), respectively;
- revising paragraph (d)(3), redesignated paragraph (e)(1)(iii), the introductory text of paragraph (e)(2), paragraph (e)(2)(i), paragraph (e)(2)(iii), and paragraph (e)(2)(iv); and
- adding paragraphs (e)(2)(v) and (e)(2)(vi),

to read as follows:

§ 61.42 Price cap baskets and service categories.

* * * * *

(d) * * *

* * * * *

(3) A basket for trunking services as described in §§ 69.110, 69.111, 69.112, 69.114, 69.124, and 69.125 of this chapter;

* * * * *

(e) (1) * * *

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(iii) data base access services; and

* * * * *

(2) The trunking basket shall contain such transport and special access services as the Commission shall permit or require, including the following service categories and subcategories:

(i) Voice grade entrance facilities, voice grade direct-trunked transport, voice grade dedicated signalling transport, voice grade special access, WATS special access, metallic special access, and telegraph special access services;

* * * * *

(iii) High capacity flat-rated transport, high capacity special access, and DDS services, including the following service subcategories:

(A) DS1 entrance facilities, DS1 direct-trunked transport, DS1 dedicated signalling transport, and DS1 special access services; and

(B) DS3 entrance facilities, DS3 direct-trunked transport, DS3 dedicated signalling transport, and DS3 special access services;

(iv) Wideband data and wideband analog services;

(v) Tandem-switched transport, as described in § 69.111 of this chapter; and

(vi) Interconnection charge, as described in § 69.124 of this chapter.

* * * * *

4. Section 61.47 is amended by:

- redesignating paragraph (e)(1) as paragraph (e) and revising it;
- redesignating paragraphs (e)(2) and (e)(3) as paragraphs (g)(2) and (g)(3), respectively, and revising them;
- redesignating paragraphs (f) and (g) as paragraphs (f)(1) and (f)(2), respectively;
- redesignating paragraph (h)(1) as paragraph (g)(1);

- redesignating paragraphs (h)(2) and (h)(3) as paragraphs (h)(1) and (h)(2), respectively, and revising them;
- redesignating paragraph (i) as paragraph (g)(4);
- inserting the words "or subcategories" after the words "service categories" in paragraphs (a) and (b);
- inserting the words "or subcategory" after the words "service category" in paragraphs (a) and (c);
- removing the words "Notwithstanding paragraphs (e) and (f) of this section" from redesignated paragraph (f)(2) and inserting, in their place, "Notwithstanding paragraph (f)(1) of this section";
- removing the words "Notwithstanding paragraph (e) of this section" from redesignated paragraphs (g)(1) and (g)(4); and
- inserting introductory text into paragraphs (f), (g), and (h),

to read as follows:

§ 61.47 Adjustments to the SBI; pricing bands.

* * * * *

(e) Pricing bands shall be established each tariff year for each service category and subcategory within a basket. Except as provided in paragraphs (f), (g), and (h) of this section, each band shall limit the pricing flexibility of the service category or subcategory, as reflected in its SBI, to an annual increase or decrease of five percent, relative to the percentage change in the PCI for that basket, measured from the levels in effect on the last day of the preceding tariff year.

(f) Dominant interexchange carriers.

(1) * * *

(2) * * *

(g) Local exchange carriers -- Service categories and subcategories.

(1) * * *

(2) The upper pricing band for the tandem-switched transport service category shall limit the annual upward pricing flexibility for this service category, as reflected in its SBI, to two percent, relative to the percentage change in the PCI for the trunking basket, measured from the levels in effect on the last day of the preceding tariff year. The lower pricing band for the tandem-switched transport service category shall limit the annual downward pricing flexibility for this service category, as reflected in its SBI, to five percent, relative to the percentage change in the PCI for the trunking basket, measured from the levels in effect on the last day of the preceding tariff year.

(3) The upper pricing band for the interconnection charge service category shall limit the annual upward pricing flexibility for this service category, as reflected in its SBI, to zero percent, relative to the percentage change in the PCI for the trunking basket, measured from the levels in effect on the last day of the preceding tariff year. There shall be no lower pricing band for the interconnection charge.

(4) * * *

(h) Local exchange carriers -- Density pricing zones.

(1) In addition to the requirements of paragraphs (g)(1) and (g)(2) of this section, those local exchange carriers subject to price cap regulation that have established density pricing zones pursuant to § 69.123 of this chapter shall use the methodology set forth in paragraphs (a) through (d) of this section to calculate separate subindexes in each zone for each of the following groups of services:

(A) DS1 entrance facilities, DS1 direct-trunked transport, DS1 dedicated signalling transport, and DS1 special access services;

(B) DS3 entrance facilities, DS3 direct-trunked transport, DS3 dedicated signalling transport, and DS3 special access services;

(C) voice grade entrance facilities, voice grade direct-trunked transport, and voice grade dedicated signalling transport, and (if the Commission, by order, designates such services as subject to competition) voice grade special access;

(D) tandem-switched transport; and

(E) such other special access services that the Commission may designate by order.

(2) The annual pricing flexibility for each of the subindexes specified in paragraph (h)(1) of this section shall be limited to an annual increase of five percent or an annual decrease of ten percent, relative to the percentage change in the PCI for the trunking basket, measured from the levels in effect on the last day of the preceding tariff year.

5. Section 61.48 is amended by revising paragraphs (g) and (h) and adding paragraph (i), to read as follows:

§ 61.48 Transition rules for price cap formula calculations.

* * * * *

(g) Local Transport Restructure -- Initial Rates. Local exchange carriers subject to price cap regulation shall set initial transport rates, as defined in § 69.2(tt) of this chapter, according to the requirements set forth in §§ 69.108, 69.110, 69.111, 69.112, 69.124, and 69.125 of this chapter.

(h) Local Transport Restructure -- Price Cap Transition Rules.

(1) Definitions. The following definitions apply for purposes of this paragraph (h):

"Effective date" is **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER.]**

"Transport restructure date" is the date on which local exchange carriers' initial transport rates, as defined in § 69.2(tt) of this chapter, became effective;

"Initial restructured rates" are rates that are (or should have been) effective on the transport restructure date; and

"Revenue weight" of a given group of services included in a basket, service category, or subcategory is the ratio of base period demand for the given service rate elements included in the basket, service category, or subcategory priced at initial restructured rates, to the base period demand for the entire group of rate elements comprising the basket, service category, or subcategory priced at initial restructured rates.

(2) Trunking Basket PCI and API.

(i) On the effective date, the PCI value for the trunking basket, as defined in § 61.42(d)(3), shall be computed by multiplying the API value for the special access basket on the day preceding the transport restructure date, by a weighted average of the following:

(A) The ratio of the PCI value that applied to the special access basket on the day preceding the transport restructure date, to the API value that applied to the special access basket on the day preceding the transport restructure date, weighted by the revenue weight of the special access services included in the trunking basket; and

(B) The ratio of the PCI value that applied to the traffic sensitive basket on the day preceding the transport restructure date, to the API value that applied to the traffic sensitive basket on the day preceding the transport restructure date, weighted by the revenue weight of the transport services included in the trunking basket.

(ii) On the effective date, the API value for the trunking basket referred to in § 61.42(e)(2) shall be equal to the API value for the special access basket on the day preceding the transport restructure date.

(3) Service Category and Subcategory Pricing Bands for Flat-Rated Transport and Special Access. From the effective date through the end of the tariff year, the following shall govern instead of §§ 61.47(e) and 61.47(g)(1). The pricing bands established for the voice grade and high capacity service categories referred to in §§ 61.42(e)(2)(i) and 61.42(e)(2)(iii), and the DS1 and DS3 service subcategories referred to in §§ 61.42(e)(2)(iii)(A) and 61.42(e)(2)(iii)(B), shall limit the pricing flexibility of the service category or subcategory, as reflected in its SBI, as follows:

(i) The upper pricing band shall be a weighted average of the following:

(A) The upper pricing band that applied to the special access services included in the category or subcategory on the day preceding the transport restructure date, weighted by the revenue weight of the special access services included in the category or subcategory; and

(B) 1.05 times the SBI value for the special access services included in the category or subcategory on the day preceding the transport restructure date, weighted by the revenue weight of the transport services included in the category or subcategory.

(ii) The lower pricing band shall be a weighted average of the following:

(A) The lower pricing band that applied to the special access services included in the category or subcategory on the day preceding the transport restructure date, weighted by the revenue weight of the special access services included in the category or subcategory; and

(B) 0.95 times the SBI value for the special access services included in the category or subcategory on the day preceding the transport restructure date, weighted by the revenue weight of the transport services included in the category or subcategory.

(iii) On the effective date, the SBI value for the category or subcategory shall be equal to the SBI value for the corresponding special access category or subcategory on the day preceding the effective date.

(4) Tandem-Switched Transport and Interconnection Charge SBIs. On the effective date, the SBIs for the tandem-switched transport and interconnection charge service categories defined in § 61.42(e)(2)(v) and (vi) shall be assigned an initial value prior to adjustment of 100, corresponding to the initial restructured rates in those categories.

(5) Tandem-Switched Transport and Interconnection Charge Service Category Pricing Bands. From the effective date through the end of the tariff year, the following shall govern instead of § 61.47(g)(2) and (g)(3):

(i) The upper pricing band for the tandem-switched transport service category shall limit the upward pricing flexibility for this service category, as reflected in its SBI, to two percent, measured from the initial restructured rates for tandem-switched transport. The lower pricing band for the tandem-switched transport service category shall limit the downward pricing flexibility for this service category, as reflected in its SBI, to five percent, measured from the initial restructured rates for tandem-switched transport.

(ii) The upper pricing band for the interconnection charge service category shall limit the upward pricing flexibility for this service category, as reflected in its SBI, to zero percent, measured from the initial restructured rate for the interconnection charge.

(i) Transport and Special Access Density Pricing Zone Transition Rules.

(1) Definitions. The following definitions apply for purposes of this paragraph (i):

"Special access zone date" is the date on which a local exchange carrier tariff establishing divergent special access rates in different zones, as described in § 69.123(c) of this chapter, becomes effective.

"Transport zone date" is the date on which a local exchange carrier tariff establishing divergent switched transport rates in different zones, as described in § 69.123(d) of this chapter, becomes effective.

"Earlier date" is the earlier of the special access zone date and the transport zone date.

"Later date" is the later of the special access zone date and the transport zone date.

"Earlier service" is special access if the special access zone date precedes the transport zone date, and is transport if the transport zone date precedes the special access zone date.

"Later service" is transport if the special access zone date precedes the transport zone date, and is special access if the transport zone date precedes the special access zone date.

"Revenue weight" of a given group of services included in a zone category is the ratio of base period demand for the given service rate elements included in the category priced at existing rates, to the base period demand for the entire group of rate elements comprising the category priced at existing rates.

(2) Simultaneous Introduction of Special Access and Transport Zones. Local exchange carriers subject to price cap regulation that have established density pricing zones pursuant to § 69.123 of this chapter, and whose special access zone date and transport zone date occur on the same date, shall initially establish density pricing zone SBIs and bands pursuant to the methodology in § 61.47(h).

(3) Sequential Introduction of Zones in the Same Tariff Year. Notwithstanding § 61.47(h), local exchange carriers subject to price cap regulation that have established density pricing zones pursuant to § 69.123 of this chapter, and whose special access zone date and transport zone date occur on different dates during the same tariff year, shall, on the earlier date, establish density pricing zone SBIs and pricing bands using the methodology described in § 61.47(h), but applicable to the earlier service only. On the later date, such carriers shall recalculate the SBIs and pricing bands to limit the pricing flexibility of the services included in each density pricing zone category, as reflected in its SBI, as follows:

(i) The upper pricing band shall be a weighted average of the following:

(A) The upper pricing band that applied to the earlier services included in the zone category on the day preceding the later date, weighted by the revenue weight of the earlier services included in the zone category; and

(B) 1.05 times the SBI value for the services included in the zone category on the day preceding the later date, weighted by the revenue weight of the later services included in the zone category.

(ii) The lower pricing band shall be a weighted average of the following:

(A) The lower pricing band that applied to the earlier services included in the zone category on the day preceding the later date, weighted by the revenue weight of the earlier services included in the zone category; and

(B) 0.90 times the SBI value for the services included in the zone category on the day preceding the later date, weighted by the revenue weight of the later services included in the zone category.

(iii) On the later date, the SBI value for the zone category shall be equal to the SBI value for the category on the day preceding the later date.

(4) Introduction of Zones in Different Tariff Years. Notwithstanding § 61.47(h), those local exchange carriers subject to price cap regulation that have established density pricing zones pursuant to § 69.123 of this chapter, and whose special access zone date and transport zone date do not occur within the same tariff year, shall, on the earlier date, establish density pricing zone SBIs and pricing bands using the methodology described in § 61.47(h), but applicable to the earlier service only.

(i) On the later date, such carriers shall use the methodology set forth in paragraphs (a) through (d) of § 61.47 to calculate separate SBIs in each zone for each of the following groups of services:

(A) DS1 special access services;

(B) DS3 special access services;

(C) DS1 entrance facilities, DS1 direct-trunked transport, and DS1 dedicated signalling transport;

(D) DS3 entrance facilities, DS3 direct-trunked transport, and DS3 dedicated signalling transport;

(E) voice grade entrance facilities, voice grade direct-trunked transport, and voice grade dedicated signalling transport;

(F) tandem-switched transport; and

(G) such other special access services as the Commission may designate by order.

(ii) From the later date through the end of the following tariff year, the annual pricing flexibility for each of

the subindexes specified in paragraph (i)(4)(i) of this section shall be limited to an annual increase of five percent or an annual decrease of ten percent, relative to the percentage change in the PCI for the trunking basket, measured from the levels in effect on the last day of the tariff year preceding the tariff year in which the later date occurs.

(iii) On the first day of the second tariff year following the tariff year during which the later date occurs, the local exchange carriers to which this paragraph applies shall establish the separate subindexes provided in § 61.47(h)(1), and shall set the initial SBIs for those density pricing zone categories that are combined (specified in paragraphs (i)(4)(i)(A) and (i)(4)(i)(C), (i)(4)(i)(B) and (i)(4)(i)(D), and (i)(4)(i)(E) and (i)(4)(i)(G) of this section) by computing the weighted averages of the SBIs that applied to the formerly separate zone categories, weighted by the revenue weights of the respective services included in the zone categories.

6. Section 61.49(c) is amended by removing the words "§§ 61.47(e) and (f)" and adding, in their place, the words "§§ 61.47(e), (f)(1), (g), and (h)"; and by removing the words "§ 61.47(g)" and adding in their place, the words "§ 61.47(f)(2)".

7. Section 61.49(d) is amended by removing the words "§ 61.47(e)" and adding, in their place, the words "§§ 61.47(e), (g), and (h)".

8. Section 61.58(c)(3) is amended by removing the words "§§ 61.47(e) and (f)" and adding, in their place, the words "§§ 61.47(e), (f)(1), (g), and (h)"; and by removing the words "§ 61.47(g)" and adding in their place, the words "§ 61.47(f)(2)".

9. Section 61.58(c)(4) is amended by removing the words "§ 61.47(e)" and adding, in their place, the words "§§ 61.47(e), (g), and (h)".

PART 69 -- ACCESS CHARGES

1. The authority citation for Part 69 continues to read as follows:

AUTHORITY: Secs. 4, 201, 202, 203, 205, 218, 403, 48 Stat. 1066, 1070, 1072, 1077, 1094, as amended, 47 U.S.C. 154, 201, 202, 203, 205, 218, 403.

2. Sections 69.110(c)(1) and 69.110(c)(2) are amended by removing the words "to recover the costs" and adding, in their place, the words "for use".

3. Section 69.113(a) is amended by removing the words "69.110, 69.111, 69.112".

4. Section 69.113(d) is amended by removing the words "Transport element or elements" and adding, in their place, the words "interconnection charge element".

5. Section 69.113(e) is amended by removing the words "transport or".

6. Section 69.124(a) is amended by removing the final comma and the words "except as provided in subsection (c)".

7. Section 69.126 is amended by removing the words "May 1, 1994" and adding, in their place, the words "six months after the effective date of the tariffs introducing initial transport rates".

Concurring Statement
of
Commissioner Ervin S. Duggan

In Re: Transport Rate Structure and Pricing

I support our decision today to revise the price cap baskets and bands for transport. But because the Commission does not address all of the issues still pending in the transport proceeding, I have chosen to concur. In my view, the Commission should have resolved the balance of the issues remaining on reconsideration of our original 1992 transport decision before the new transport rates took effect on December 30, 1993. Today's order, in my view, leaves open questions that we should have addressed as we begin, and go forward under, the new transport regime.

The reconsideration petitions have asserted, for example, that the interim scheme for transport may not be sufficiently cost-based. The petitions also have raised legitimate questions about whether the rate structure we prescribed could lead to unreasonable discrimination between high- and low-volume customers of transport services. The petitions, in addition, have raised concerns about adverse economic effects on smaller interexchange carriers and on competition in the long distance marketplace if the Commission were to fail to properly set the rules for transport restructure.

I would have preferred giving those arguments full attention on reconsideration and resolving them before now. Any changes we make in the future could be costly and disruptive, and will come only after adverse impacts on smaller carriers have already been felt.

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